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Supreme Court, U.S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-87

POLICE DEPARTMENT OF THE CITY OF CHICAGO, ET AL.,

Petitioners,

vs.

EARL D. MOSLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR CERTIORARI FILED FEBRUARY 25, 1971.
CERTIORARI GRANTED OCTOBER 12, 1971.

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APPENDIX.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES.

In the United States District Court
For the Northern District of Illinois,
Eastern Division.

No. 68 C 1979

October 23, 1968—Complaint for injunction and declaratory judgment filed.

November 15, 1968—Marshal's return, showing service of summons on Superintendent Conlisk and Chicago Police Department, filed.

November 26, 1968—Marshal's return, showing service of summons on Richard J. Daley, filed.

February 25, 1969—Answer of defendants filed.

June 11, 1969—Plaintiff's requests for admissions, Nos. 1-7, directed to defendants, filed.

June 11, 1969—Trial of action commenced. Evidence for plaintiff heard and plaintiff rests.

June 11, 1969—Defendants' motion for directed verdict, with supporting memorandum, filed.

July 1, 1969—Plaintiff's memorandum in opposition to defendants' motion for directed verdict filed.

July 9, 1969—Defendants' reply memorandum in support of their motion for directed verdict filed.

July 22, 1969—Defendants' motion for a directed verdict granted.

August 19, 1969—Findings of fact and conclusions of law entered. Order entered dismissing complaint.

September 17, 1969—Notice of appeal filed by plaintiff.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

No. 18021

October 25, 1969—Record on appeal filed.

January 15, 1970—Appellant's brief and appendix filed.

April 16, 1970—Appellees' brief filed.

September 23, 1970—Oral argument heard. Cause taken under advisement.

October 29, 1970—Judgment order entered, reversing, with costs, and remanding to District Court with directions. Opinion by Judge Hastings filed.

November 6, 1970—Order entered staying mandate 30 days.

December 18, 1970—Mandate issued.

December 21, 1970—Order entered recalling mandate and staying it for 30 days.

January 25, 1971—Notice filed of order of Supreme Court granting extension of time to file petition for certiorari to February 26, 1971.

March 3, 1971—Notice filed of filing petition for certiorari on February 25, 1971.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 70-87

January 20, 1971—Order entered by Mr. Justice Marshall, Circuit Justice for the Seventh Circuit, extending time for filing petition for certiorari to February 26, 1971.

February 25, 1971—Petition for writ of certiorari filed by defendants.

October 12, 1971—Order entered granting certiorari. Cause ordered consolidated with *Grayned* v. *City of Rockford*, No. 70-5106.

[C2] IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,

Eastern Division.

EARL D. MOSLEY,
Plaintiff,

vs.

POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, Superintendent of the Police Department, etc., and RICHARD J. DALEY, Mayor of the City of Chicago,
Defendants.

No. 68 C 1979.

COMPLAINT FOR INJUNCTION AND DECLARATORY JUDGMENT.

(Filed Oct. 23, 1968.)

1. The Police Department of the City of Chicago is a duly authorized agency of the City and is empowered with the duty to enforce the ordinances and laws of the City of Chicago and the State of Illinois.

2. Defendant James B. Conlisk is Superintendent of the Police Department of the City of Chicago and is authorized to direct the police of the City of Chicago with respect to all matters referred to in the prayer of this complaint.

3. Defendant Richard J. Daley is Mayor of the City of Chicago and is responsible for the conduct of the agencies of such city, including the Police Department of the City of Chicago.

[C3] 4. Jurisdiction of this court is based on 42 USC, Section 1983 and 28 USC, Section 1343 which provide for

interlocutory and permanent injunctive relief by this court, and 28 USC, Section 2201, which provides for declaratory judgment by this court.

5. On March 26, 1968 the following ordinance relating to picketing and demonstrating was adopted by the City Council of the City of Chicago, and is in effect at the present time:

> Be It Ordained by the City Council of the City of Chicago:
>
> Section I. The Municipal Code of the City of Chicago is amended by striking Chapter 193, Section 1, in its entirety, and inserting therefor the following:
>
> 193-1. A person commits disorderly conduct when he knowingly:
>
> . . . . . .
>
> (i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute;

6. Prior to the passage of the above-quoted Ordinance, plaintiff Earl D. Mosley of 7326 South Stewart Avenue, Chicago, Illinois had on several week-day afternoons, each week for many weeks, peacefully walked, while school was in session, on the public side-walk right- [C4] of-way within 150 feet of Jones Commercial High School, located at 610 South State Street, Chicago, Illinois, carrying a sign, to protest and demonstrate against certain conditions at said High School.

7. Plaintiff wishes to continue to peacefully engage in said protest, and to demonstrate by carrying said sign on the public side-walks within 150 feet of said school while

said school is in session, to inform the teachers, students, parents of students and others concerned with Jones Commercial High School of his beliefs concerning said conditions at said school.

8. Shortly after the passage of said ordinance, plaintiff was informed by an employee of the Public Relations Department of the Police Department of the City of Chicago that said ordinance had been adopted, and that it was now illegal to picket within 150 feet of a school when the school is in session as stated by said ordinance. Plaintiff was advised that, in the opinion of said employee, the picketing which plaintiff had been engaged in is made illegal by said ordinance.

9. Plaintiff later went to the local District Headquarters or Precinct Headquarters of the Police Department of the City of Chicago, having jurisdiction over the portion of the city wherein said high school is located, [C5] and inquired of Police Officer Sergeant Hays, Badge No. 1005, on duty at said Headquarters, and in charge at the time, whether or not plaintiff would be arrested for demonstrating at said school in the manner described in paragraphs 6 and 7. Plaintiff was informed by said Police Officer that such activities would be illegal, and that plaintiff would be arrested promptly if he were to engage in said activities. Plaintiff's attorney contacted by telephone an attorney in the office of the corporation counsel of the City of Chicago and inquired of said attorney whether the City and said office regarded said Ordinance as constitutional. Plaintiff's attorney was informed that said office and the City regarded said Ordinance as constitutional and would uphold the enforcement thereof.

Plaintiff has taken every reasonable action, short of actually demonstrating as plaintiff wishes to do and being arrested for said demonstrating, to determine how said

Ordinance is being enforced by the Police Department and the City of Chicago. On the basis of the information obtained, plaintiff has therefore refrained from engaging in said activities which he would otherwise engage in.

10. The Ordinance, Chapter 193-1(i) of the Municipal Code of the City of Chicago is unconstitutional on its face, because said Ordinance unduly and unnecessarily restricts plaintiff's rights of free speech and plaintiff's right to peacefully and quietly express his convictions [C6] and beliefs, in violation of the First and Fourteenth Amendments to the Constitution of the United States, and because said Ordinance denies to plaintiff equal protection of the law in violation of the First and Fourteenth Amendments to the Constitution of the United States.

11. Said Ordinance is also unconstitutional as it is being enforced in regard to plaintiff, in violation of plaintiff's rights under the First and Fourteenth Amendments enumerated in paragraph 10 above.

12. Plaintiff is irreparably damaged by the Ordinance complained of herein, and plaintiff is without adequate remedy at law.

PLAINTIFF THEREFORE PRAYS FOR THE FOLLOWING RELIEF.

1. That the Defendants Police Department of the City of Chicago, James B. Conlisk, and Richard J. Daley may answer this Complaint and each statement therein made.

2. That this Court declare the Ordinance cited above, Chapter 193-1(i) of the Municipal Code of the City of Chicago, is unconstitutional and shall not be enforced.

3. That this Court issue a Preliminary Injunction pending hearing on the merits and then a permanent injunction

restraining the Defendants, and each of them and their officers, agents, servants, and representatives as follows:

[C7] (A) From interfering in any manner with the free exercise by plaintiff of his right to peacefully and quietly picket on the right-of-way around Jones Commercial High School.

(B) From arresting, prosecuting, or imposing any criminal penalties upon plaintiff for peacefully and quietly picketing on said right-of-way.

(C) From directing, assisting, aiding or abetting in any manner whatsoever any person or persons to commit any of the acts enjoined by this court.

4. That plaintiff may have such other and further relief as is just and equitable.

Dated: October, 1968.

/s/ Joe C. Young,
Alberts, Brezina & Lund,
33 North Dearborn Street,
Chicago, Illinois 60602,
Attorney for Plaintiff.

Of Counsel:
David Goldberger,
American Civil Liberties Union,
6 South Clark Street,
Chicago, Illinois,
236-5564.

[C8-C19] • • •

[C20] IN THE UNITED STATES DISTRICT COURT.

No. 68 C 1979.

ANSWER TO THE COMPLAINT FOR INJUNCTION AND DECLARATORY JUDGMENT.

(Filed Feb. 25, 1969.)

Now come the defendants, Police Department of the City of Chicago, James B. Conlisk, Superintendent of the Police Department of the City of Chicago and Richard J. Daley, Mayor of the City of Chicago, by their attorney, Raymond F. Simon, Corporation Counsel of the City of Chicago, and in answer to the complaint of the plaintiff answers as follows:

1. These answering defendants admit the allegations therein contained in paragraph 1;

[C21] 2. These answering defendants admit the allegations therein contained in paragraph 2;

3. These answering defendants admit the allegations therein contained in paragraph 3;

4. These answering defendants deny that this court has jurisdiction under Title 42 U. S. C. Section 1983 and 28 U. S. C. Section 1343 of the United States Code;

5. These answering defendants admit the allegations therein contained in paragraph 5;

6. These answering defendants do not have sufficient knowledge to either affirm or deny the allegations therein contained in paragraph 6, and therefore will deny the same and demand strict proof thereof;

7. These answering defendants do not have sufficient knowledge to either affirm or deny the allegations therein contained in paragraph 7, and therefore will deny the same and demand strict proof thereof;

8. These answering defendants do not have sufficient knowledge to either affirm or deny the allegations therein contained in paragraph 8, and therefore will deny the same and demand strict proof thereof;

[C22] 9. These answering defendants do not have sufficient knowledge to either affirm or deny the allegations therein contained in paragraph 9, and therefore will deny the same and demand strict proof thereof;

10. These answering defendants deny each and every allegation of paragraph 10 therein contained;

11. These answering defendants deny each and every allegation of paragraph 11 therein contained;

12. These answering defendants deny each and every allegation of paragraph 12 therein contained.

Wherefore, these answering defendants deny that the plaintiff is entitled to said relief which he prays for in his complaint and that said complaint should be dismissed.

[C26] IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

No. 68 C 1979

PLAINTIFF'S REQUESTS FOR ADMISSION NOS. 1-7 TO DEFENDANT.

(Filed June 11, 1969.)

Please Take Notice that Plaintiff, Earl Mosley, requests each of the Defendants, Police Department of the City of Chicago, James B. Conlisk and Richard J. Daley, pursuant to Rule 36 of the F. R. Civ. P., within 10 days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinant objections to admissibility which may be interposed at trial.

[C27] 1. Defendant's contend that the portion of the Ordinance involved in this case, Chapter 193, Section 1(i) is valid and enforceable, and Defendant's intend to enforce said Ordinance.

2. If Plaintiff walks peacefully and quietly on the public right of way within 150 feet of Jones Commercial High School, during school session, carrying a sign with language protesting policies of the school administration, as Plaintiff has alleged in his Complaint that he did prior to the enactment of the Ordinance referred to in Request No. 1, Plaintiff will be considered in violation of said Ordinance.

3. Referring to Request No. 2, Plaintiff will be arrested by agents or employees of the Police Department of the City of Chicago, on the grounds that Plaintiff is in violation of said Ordinance.

4. The Police Department of the City of Chicago is not aware of any reason to believe that the Plaintiff has not conducted himself peacefully and quietly and in an orderly fashion at all times in connection with his alleged activities at or near Jones Commercial High School, referred to in Plaintiff's Complaint.

[C28] 5. The Police Department of the City of Chicago has no evidence upon which to base any belief that Plaintiff will not conduct himself in a peaceful orderly and quiet manner in the future, if he is granted the relief which he seeks in this action.

6. The Police Department of the City of Chicago is not aware of any disturbance caused by or resulting from any conduct on the part of Plaintiff which he alleged in his Complaint.

7. At all times when Plaintiff has engaged in the conduct alleged in the Complaint, Plaintiff has been either alone or with at most four or five other persons peacefully walking near Jones Commercial High School carrying a sign or signs.

Dated: April 8, 1969.

[C29-C30] • • •

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

No. 68 C 1979

REPORT OF PROCEEDINGS BEFORE THE HONORABLE JOSEPH SAM PERRY.

(June 11, 1969.)

[1] * * *

[2] * * * Mr. Young: Your Honor, this case involves a constitutional challenge of a picketing ordinance of the City of Chicago.

The plaintiff in the case is a gentleman who is a concerned citizen, concerned about the educational system in Chicago and the schools; and, particularly, he is concerned about his belief that certain of the schools practice certain racial discrimination.

Now we plan to show that the plaintiff had proper reasons, had justification for this belief. We are not going to argue about whether he is right or not, because we do not think this is important to the case; but [3] that he did have reason to believe that a certain school in the City of Chicago—particularly Jones Commercial High School—does have certain practices which are racially discriminatory. The plaintiff, Mr. Mosley, tried in various ways to get the school to change its policies. He met with Superintendent Redman. He met with the director of the school. He met with various people in the school system.

The Court: Has he met with the school board?

Mr. Young: He did not meet with the Board itself, but he met with certain representatives of the Board.

The Court: Did he meet with the chairman of the Board, Mr. Whiston?

Mr. Young: I do not believe he did, your Honor, but as I said, he did meet with representatives of the Board.

As a result of these meetings, he felt that he was not really accomplishing the purpose he wanted and he decided that the only alternative he had was to go to the school and picket, actually carrying a sign, walking to and fro in front of the school on the public sidewalk, with the sign stating his belief in certain [4] discriminatory practices at Jones. Particularly, I might add, the practice that he was mainly concerned about was that he felt there was a quota system at Jones in terms of admissions, in that Jones was only allowing any certain number of Negro students each year.

I think that is enough, dealing with the beliefs of the plaintiff, to show that he did have a reason to believe that discrimination was being practiced and he had a reason to believe that the other means he had tried had not worked.

The real issue, however, is that Mr. Mosley picketed the school for many months, day in and day out. He is a mail carrier and when he gets off at 2:30 in the afternoon, he would go almost every day to the school and picket for a couple of hours, trying to get something accomplished.

I believe it was on April 5th, 1968, the City of Chicago passed an ordinance which prohibited picketing of schools.

I would like to just read the ordinance. It is very brief:

"Be it ordained by the City Council of the City of Chicago, the Municipal Code of the City of Chicago [5] is amended by striking Chapter 193, Section 1, in its entirety and inserting therefor the following:

"193(1) A person commits disorderly conduct when he knowingly"—and this is Subsection (i)—"pickets

or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session or one-half hour before the school is in session and one-half hour after the school session has been concluded; provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute."

Your Honor, this last proviso is the one which we are particularly challenging in this case. We have maintained that the proviso regarding the labor dispute not only constitutes a violation of the equal protection clause of the Constitution; but because it is in there, it shows that this ordinance was really designed to prohibit the content of certain picketing. In other words, it is not picketing itself that this ordinance is concerned with. It is certain kinds of picketing and this is shown by [6] the proviso, I think, so it violates not only the equal protection clause but the free speech clause of the Thirteenth and Fourteenth Amendments.

The Court: All right, let me have the opening statement for the City.

Mr. Chambers: Thank you, your Honor.

We will make it very brief. We have certain memoranda; and if it please the Court, may we tender certain memoranda to the Court that we have.

The Court: Yes, you may do so.

I take it you are giving a copy to counsel?

Mr. Chambers: Yes, your Honor.

We will respond very briefly. Counsel states that there is racial discrimination at Jones or there is the belief that there is racial discrimination at Jones Commercial School.

It is our position that this is irrelevant and immaterial to the issues. The issue here and the challenge is whether or not this particular ordinance, Section 193(1), Subsec-

tion (i) of the Municipal Code of the City of Chicago is unconstitutional.

Counsel states that it violates the equal protection and freedom of speech clause of the United States [7] Constitution. It is the City's position that the ordinance is constitutional. We feel the ordinance is not a violation of the equal protection clause of the Fourteenth Amendment; and that it is not a violation of the freedom of speech, in that it is not a complete prohibition of picketing at the school.

The Court: You maintain that it is a regulation?

Mr. Chambers: It is only a reasonable regulation.

The Court: Your position is that you do not regulate picketing by a labor organization at the same time. That is the heart of their complaint, as I see it.

Mr. Chambers: Yes, your Honor.

It is further the position of the City that the City has no right to regulate labor disputes. We feel that certain federal laws have preempted the City from interfering; and that if there is a labor dispute with the union and the Board of Education, that the City would not be in a position to regulate it.

The Court: Does that give individuals who belong to a labor union more protection or different protection from that accorded to someone who does not belong [8] to a labor union?

Mr. Chambers: No, that is not our position. Our position, your Honor, is that there are certain laws, federal laws, that regulate labor disputes. We do not feel the City has a right—

The Court: Your position is that the federal Government has preempted the law? Congress has preempted laws in the field of labor?

Mr. Chambers: Yes, your Honor, we have that in our

memorandum and we also have legal authority to that effect.

We realize the crux of counsel's argument, but the ordinance was carefully thought out and this particular provision of the subsection of the disorderly conduct ordinance was carefully thought out and placed in here. We even thought of the idea of some discriminatory clauses in the ordinance. The City was not unmindful, those who framed this ordinance, of this particular problem.

This is our position. We feel that the City is preempted by certain federal laws governing labor disputes and for this reason, this particular section was placed into the subsection of the ordinance.

We further feel, your Honor, that the qualification [9] is reasonable and it is reasonable as to time, manner and place.

It is our further position that the constitutional rights are not absolute, but limited for the protection of the rights of others. Now this defendant is not completely prohibited from picketing at, near or about the school during certain hours. It is only within 150 feet during the time that the school is in session, one-half hour before or one-half hour afterward. But even during the time that the school is in session, this plaintiff may picket during all hours of the school as long as it is at least 150 feet away from the school while it is in session and one-half hour before and one-half hour afterwards.

This is our position. We feel that this ordinance is not a violation of the equal protection or freedom of speech. He is not completely prohibited from the kind of activity that he seeks to get injunctive relief against.

This is our position.

[10] EARL MOSLEY, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Young.

* * * * *

Q. Now, Mr. Mosley, could you just explain in [11] general terms the facts which have led up to your complaint in this case?

A. Well, this all began about February, 1967. I was a member of Citywide Concerned Parents, the parents from the West Side, Far South Side, Near North Side. These are housing projects.

The fact came up that this new Jones Commercial High School that had been opened the previous February, 1967, would have a capacity of 1200 students. We know that down through the years, the older Jones Commercial High School, located at 607 South Plymouth Court, had a capacity of 600 students. At that school, we noticed that down through the years very few black children were allowed to attend Jones Commercial High School during the daytime. In some years, maybe two graduated; or maybe three, four, five, like that.

Then the Board of Education started putting out racial head counts.

The Court: Started putting out what?

The Witness: Racial head counts, the Board of Education. That became a Board of Education policy. I can say from '63 through '66, there was a head count at Jones and it seems that right down the line it [12] was 6 per cent black from '63 through '66. In round numbers, it came to from about 18 to 20 black students each year.

So I called this some sort of quota system.

In 1967 when the new school was about to open, we said

we would try to increase the black enrollment in the new Jones Commercial High School, which did have a capacity of 1200 students.

So at that time—on what day was that—as a member of the Concerned Parents, Jones High School became my project. So on Monday, August 7, 1967, I went to Jones Commercial High School for a tour. I took a tour of the school. I talked to Clarence B. Carey, the director of Jones High School. He has been there some 30 years, Clarence B. Carey has; and I asked him what would the black enrollment be that September when school started. He said at that time it would be 10 per cent.

So we had a meeting at the Board of Education on August 21st—I think that was a Monday—with Dr. James Redman. This is the Citywide Concerned Parents; and at that time I said they should—this was before school started in August 1967—I told Dr. Redman, when it became my chance to speak, that the black [13] enrollment in Jones should be much higher than this 10 per cent or 20 per cent, as they said it would be at that time.

I got no satisfaction there. So my threat was to start demonstrating at Jones. So I did. I think it was the second Monday in September of '67.. I started demonstrating at Jones High School. I stayed there about eight months; and most of the time I was by myself, except very few occasions Ma Houston used to come out and help me once in a while.

At no time did I cause any disturbance or block the sidewalk, because I knew on the corner of State and Harrison, there is a wide audience. You know, I can be seen in a place like that.

Well, anyhow, at the school dedication, I met Dr. Arthur R. Laney. He was Associate Superintendent of Schools at that time, in charge of vocational education. He told me to

come to his office. I said I would come and bring a committee with me.

We met at his office on November 21, at the Board of Education building. At that time, I had a committee. I had Mary Henry from the Urban League. I had Ma Houston from the Breadbasket and a couple of other people.

[14] Mr. Chambers: If the Court please, there is an objection at this time.

The Court: What is the objection?

Mr. Chambers: Your Honor, I fail to see the relevancy of this testimony, in relationship to the constitutionality of this ordinance. Also, there is no question pending. Further, there is an objection to the narrative form of the testimony.

The Court: Overruled. For what it is worth, it may go in.

You may go ahead.

By the Witness:

A. I will even sort of cut some of this off.

You see, the main idea—I am a mail carrier and I work on the North Side, you know, and I see all of the nice things going on. Then I come back where I live at 73rd and Stewart, and I belong to the PTA and I go out to the high school. I am really involved in the schools and have been involved for some years in school work and school children. I say it is very unfair, because down through the years, as Jane Adams said at one time, a black girl should be allowed to do office work.

[15] We have been kept out of office work down through the years, you know, and every morning I see the sight of so many black women coming on the North Side scrubbing floors and washing windows, and I said there should be some sort of turnabout.

Now I get right back to our committee. At our committee meeting, when we met Arthur Laney, we made some sort of demand that the class in September, 1968, be made half

black. That would be 300 black students that would be allowed to enter Jones Commercial High School.

We also said, since we found out they were having trouble inside the school, that—as one of the mothers came up and said, she would like to be treated like white. They do not treat the students right.

Another thing we find is that sometime during the operation at school, they would give black children undesirable jobs.

So we said to straighten out that sort of thing and put black teachers in Jones. This sort of thing has not been done, you know; but the main thing was to increase the enrollment in the school. I am still staying on one thing, to increase the enrollment in the school.

[16] Now as we sit here right now, according to the Board of Education head counts, there are 1,006 students in Jones Commercial High School. I say the school is being underutilized, because it has a capacity of 1200 students.

Now to break it down into race, there are supposed to be 742 white children in the school, 240 black children in the school and 20 Puerto Rican. According to the head count, it comes to about 23 per cent black. Then when you come down, say, to when graduation time comes, they are supposed to have a graduation this coming Friday. When you break it down into graduation time, you find that less than 100 black students will graduate from Jones Commercial High School; because I have made head counts. You think these numbers are inflated? Last June, 14 at Lane Technical High School, 21 black students graduated from Jones Commercial High School. Therefore, I think these figures are inflated and the main idea, the whole purpose of my sitting here, is that we need to be upgraded. Education is cheaper than relief and we have too many black people on relief. I think if a girl gets a Jones [17] education, when she grows up and her husband leaves her, instead of going

on ADC and relief, she can get a job; because that type of work they teach at Jones, they will have a skill and sort of keep holding their head up.

In other words, we want more black taxpayers instead of tax-eaters; and the only way to turn this thing around is that we have got to be allowed to go to the schools.

They said to get an education. If we are not allowed to enter the door, then that puts us in some sort of a bind that we cannot get out of and it is bad for the entire country, in the wider scope.

By Mr. Young:

Q. Mr. Mosley, based upon your beliefs regarding Jones School, you did begin to picket. When was that that you started picketing?

A. Well, I began the second Monday in September, 1967.

Q. What is the reason that you chose this form of protest?

A. The idea of exposing it to the public. I had a big picket sign there that said, "Jones High School [18] practices black discrimination. Jones High School has a black quota." That is what the sign said. I had a big sign and that was on the flip side.

• • • • •

[19] • • • By Mr. Young:

Q. Mr. Mosley, would you explain exactly where you were picketing?

Where is Jones Commercial School, first of all?

A. Well, Jones is at the intersection of Harrison and State Street. I used to begin at Harrison Street and walk to the other end of the school. The school is about a half a block long, right down State Street. I would say on only about six occasions have I had help, and that would be Ma Houston. I always kept myself out of the way. I know how to conduct myself, how to carry myself and I have had a lot

of experience. I stayed there quite a while and at no time did I block traffic. At no time did I bother people or interfere with people. My sign said what I would have to say.

Q. How did you first become informed of the ordinance that was passed by the City of Chicago?

A. Well, I was reading a newspaper. I read that they were going to pass a law that you could not picket a church or school within 150 feet during [20] school hours, and that the law would go into effect April 5.

The last day I demonstrated at the school was April 4, the date of Martin Luther King's assassination. I remember that date.

After that, I went to the Mayor's Commission on Human Relations to try to find some way out. What I did, I wrote letters to Bessie Lawrence, the district superintendent. I tried every means besides this demonstration, because it is tiresome, you know.

Q. Well, now, let me go back. After you read about the ordinance in the paper, did you at any time—were you at any time in contact with the Police Department of the City of Chicago?

A. Oh, by all means. I've been doing it so long. I contacted the Human Relations Section of the Police Department, always kept in touch with them, anything I did.

The Court: Did you ever go and start to picket, and were you ever restrained from picketing by the police at the school, being within 150 feet during school hours?

The Witness: No, at no time was I ever re-[21]strained.

The Court: You have never attempted to do so?

The Witness: Not after the law passed on April 5, 1968.

The Court: So you have not chosen the course of taking the law into your own hands and allowing yourself to be arrested for violating it. Instead, you have come into

Court seeking to set aside the ordinance as being unconstitutional.

Counsel, I will say this to you: You expect to rely, insofar as your case is concerned, not on an attempt to picket and being arrested; but you are going at it from the standpoint of obtaining an injunction against its enforcement?

Mr. Young: A declaratory judgment and an injunction.

The Court: All right, go ahead.

Mr. Young: Now, your Honor, we are going to introduce evidence and also requests for admissions that show that plaintiff would have been restrained. In fact, I might say right here that presently three people [22] are being prosecuted under this very same ordinance by the City of Chicago. This is not his case, of course, but I think counsel for the defense will—

The Court: Well, I do not take that position. Certainly, you do not have to attack an ordinance in that manner. I think you have attacked it in the correct manner, as far as that is concerned. Why go through all the bother of being arrested? You have taken the correct procedure, if you believe the law is unconstitutional, to attack it on the ground that it is unconstitutional, without having to wait for its enforcement against your particular client.

I just want to get the record straight as to whether he had been arrested or not.

Mr. Young: No, he has not been arrested.

The Court: It is not a prerequisite. If an act is unconstitutional, it is not a prerequisite that you wait and defy the act and then be brought into Court on criminal charges, and then go up in that manner. You have chosen the declaratory-judgment method, which [23] is to my mind a sound method to proceed on. It brings up the constitutionality just as effectively as if you went down

there and started picketing, got arrested, and then came in to seek to set aside the prosecution.

Mr. Young: Thank you, your Honor.

By Mr. Young:

Q. Did you at any time ask anyone at the Police Department about whether or not you would be arrested if you picketed within 150 feet of the school?

A. On one occasion last fall I went to the Eleventh Street Station and I spoke to the desk sergeant by the name of Sergeant Hayes, Badge No. 105, and I had a picture of Jones High School in one of the folders. I said, "Would I be arrested if I did picket in front of the school?"

He said yes, I would be arrested if I did picket in front of Jones High School. And that was $500 I heard.

Q. Now Mr. Mosley, since the ordinance went into effect, you said that you have—

The Court: Did you ask him if you were picketing [24] on behalf of a labor union? You did not ask that question, because the ordinance makes the exception. You did not ask him if whether or not you were picketing on behalf of a labor organization in a labor dispute, you would be arrested, because you understood—as I have understood your testimony and counsel's statement—that there is an exception in that this ordinance does not apply in a labor dispute.

Counsel has said that Congress has pre-empted the area of labor organizations, involving labor disputes. So they made an exception and you maintain that that is not equal protection of the law.

The Witness: That is right. I was unaware of the labor situation; but I know when I was across the street from the school, 150 feet away, you cannot hardly see me. The question that all of the people asked me was, "Where

is the school located?" They don't even see the school across the street, you know. So what it does, it takes away a certain amount of the effectiveness, because Jones High School is the only high school of this type in the country. People come from all [25] around—I have seen them day-after-day from everywhere—to look at Jones. You know, they intend to build schools in their area of the type of Jones; you have always got to explain that man across the street with a picket sign. I had become sort of a nuisance value, especially when I was in front of the school; but when I am across the street, I am sort of out of the picture, so to speak.

Mr. Young: I was just going into that, your Honor.

By Mr. Young:

Q. You have now said you have picketed the school since the ordinance went into effect; is that correct?

A. Yes, I have.

The Court: He has picketed it, but not within 150 feet.

By Mr. Young:

Q. But not within 150 feet.

Where have you been picketing the school since the ordinance went into effect?

A. Well, I haven't did too much picketing since [26] the ordinance went into effect, but I had an occasion last February 20, when they were dedicating the gymnasium there and Mayor Daley and a lot of people were there. This particular affair was going on and we were across the street from the school, out of sight, out of the picture, out of everything. We had a demonstration and nobody even knew anything about it, this past February 20, a nice cold day.

Since then, since it got warmer, in May I started demonstrating again every day until I got involved in this, in coming here.

But really, I am out of the picture at Jones. They can do like they want to.

Q. Do you feel that your picketing is less effective?

A. Very much so.

The Court: On what basis do you make the statement and give your testimony that there is a quota system in force there? Did you ever see any figures? Have you ever ascertained whether a person is denied the right to enroll because of color? Is there or is there not open enrollment? Is it not up to the persons [27] who qualify? Is there any standard that you know of? Do you know of any evidence whereby they set a quota of ten per cent, or six per cent, or twenty per cent, or fifty per cent?

There is no question in my mind but that there is a case right in point. There is a Supreme Court case in the Deerfield case, where the Court held there cannot be a quota system. Justice Frankfurter definitely set up that a quota system is illegal; but I am just asking you what evidence you have that there is a quota system maintained.

By the Witness:

A. Here is what I did. A key word is "recruitment". Sometime, I think, in 1966, there was a court order denying the City of Chicago—I mean, denying the State of Illinois federal funds, especially Chicago, on account of they said there was alleged discriminatory practices in our vocational high schools.

Right down to the point, I went to see Clarence B. Carey, the Director of Jones Commercial High School in March. That was March, 1968, and I said, "How [28] about increasing the enrollment in Jones? What are you going to do about that?"

He said, "We will recruit students for this coming class to start in September."

The Court: Well, really, it would not make any difference whether you were right or wrong about your belief that there was a quota system. It would not make any difference. Your right of free speech would be interfered with. The right to free speech includes the right to be wrong in your assertions, as far as that is concerned.

The real issue is what counsel for the City has said, as to whether or not it is constitutional; whether this is a case of where the equal protection of the law is denied, whether or not you can make an exception, on behalf of a labor union, on the theory that it would be in conflict with federal statutes governing labor organizations.

All right, is there anything else from the witness?

[29] Mr. Young: Well, your Honor, I would like to just ask this:

By Mr. Young:

Q. Now, Mr. Mosley, I think you mentioned it briefly, but I want to cover this again. Was there at any time any sort of disturbance involved in your picketing or have you ever hindered people from coming or going from the school, or in any way impeded progress around the school?

A. No, I wouldn't dare do that. I wouldn't dare do anything to impede anybody's progress coming to the school.

* * * * *

The Court: You have merely picketed, individually [30] yourself, and you have carried a placard and expressed your ideas of free speech and your opinions on the placard, as I understand your testimony, and you have never blocked anybody from entering the school, never interfered with people trying to enter or to conduct the business there. Is that your testimony?

The Witness: I never interfered with anyone.

Mr. Young: Your Honor, just one other thing I think I

would want to put in for the record. We asked the defendant certain requests for admissions which were not answered and are, therefore, deemed admitted.

The Court: Well, let us finish with this witness, first.

Mr. Young: Your Honor, I think I am through with the witness.

The Court: Do you wish to cross-examine this witness?

Mr. Chambers: I only have a few questions, your Honor.

The Court: Very well.

* * * * * *

[31] * * *

Cross-Examination by Mr. Chambers.

Q. Mr. Mosley, do you know whether there is, in fact, a quota system at the Jones Commercial High School?

A. Yes, there is a quota system at Jones Commercial High School.

Q. On what basis have you received this type of information?

A. I say it is a fact down through the years; black people were not admitted—

[32] Q. Have you seen any definite figures?

A. My definite figures would be from the enrollment in '68. In '68 the enrollment was 8 to 1 students. Out of 821, 165 were black.

Q. Who compiled these figures?

A. The Board of Education.

Q. Now do you know whether or not any black students are actually denied enrollment at Jones Commercial?

The Court: That is the crucial question, whether any are denied.

By the Witness:

A. No, I could not say any black student has been denied enrollment at Jones Commercial High School.

By Mr. Chambers:

Q. Now, Mr. Mosley, you, of course, realize you can still picket at the Jones Commercial High School? You know that?

A. Yes, 150 feet away from Jones.

Q. Yes. You know that you can do that?

The Court: During certain school hours. What are the hours?

Mr. Chambers: It is one-half hour before school, [33] during school hours, and one-half hour afterwards.

The Court: School begins at what time?

Mr. Chambers: I do not know, your Honor. But he may picket even during school hours. He may picket at any hour.

The Court: But 150 feet away.

Mr. Chambers: Yes.

The Court: And a half hour before school and a half hour after.

Mr. Chambers: Yes, and during school hours, he may not picket within 150 feet.

The Court: A half hour before school and a half hour after, he may picket wherever he wishes.

Mr. Chambers: Yes.

By Mr. Chambers:

Q. You realize that?

A. Yes.

The Court: That ordinance is not very clear, is it? That is, if it does not fix the hour of the opening of schools.

Mr. Chambers: Well, your Honor, all of the public schools do not open at the same time.

[34] It is my feeling that the ordinance is very clear.

The Court: The ordinance is very clear as far as the language is concerned; but so far as the enforcement of it is concerned, that leaves it rather variable. It will apply at one hour in one place and at another hour in another place;

and maybe one day it will apply at the same place at one hour, and subject to the will of the principal, probably, or the Board of Education, it may be changed. It certainly would seem to me that there ought to be a fixed hour, so that a person would understand certainly how to govern themselves. The ordinance seems to me to be vague in its meaning. It is clear in its language, as far as the language is concerned; but the meaning, by not fixing any specific hour but leaving it at a variable hour, it is vague.

Mr. Chambers: It was the intention of the framers of this ordinance, your Honor, to encompass every opening hour and closing hour of the schools. Since the hours of the schools vary themselves, if you set a specific hour, it might not cover all of the schools.

[35] The Court: Go ahead.

Mr. Chambers: I have no further questions, your Honor.

The Court: No further cross-examination.

Is there any further redirect?

Mr. Young: Well, your Honor, I thought the defendant contended it was not important whether Mr. Mosley had any reason to believe that there was discrimination. I could ask some more questions along that line.

The Court: Very well. The witness is excused.

That concludes your evidence, does it?

Mr. Young: Yes.

The Court: You have no evidence to put in?

Mr. Chambers: The City has no evidence, your Honor. We feel that the arguments are purely legal.

[36] Mr. Chambers: Yes, but we heard your Honor also make certain statements.

The Court: This is all the evidence that you have on behalf of the plaintiff in this case?

Mr. Young: Yes, your Honor.

The Court: As far as you are concerned, the defendant rests?

Mr. Young: Your Honor, I am sorry, I did want to read into the record the request for admissions which we submitted and which are deemed admitted, if I may.

The Court: All right. The witness is excused from the witness stand.

(Witness excused.)

The Court: All right, you may proceed to read your requests for admissions into evidence.

Mr. Young: These requests were served on the City and were not responded to and are deemed admitted, your Honor.

Number one: Defendants contend that the portion of the ordinance involved in this case, Chapter 193, Section 1(i) is valid and enforceable and defendants intend [37] to enforce said ordinance.

Paragraph two: If plaintiff walks peacefully and quietly on the public right-of-way within 150 feet of Jones Commercial High School during school sessions, carrying a sign with language protesting policies of the school administration, as plaintiff has alleged in his complaint that he did prior to the enactment of the ordinance referred to in Request No. 1, plaintiff will be considered in violation of said ordinance.

Referring to Request No. 2, plaintiff will be arrested by agents or employees of the Police Department of the City of Chicago on the ground that plaintiff is in violation of said ordinance.

Paragraph 4: The Police Department of the City of Chicago is not aware of any reason to believe that the plaintiff has not conducted himself peacefully and quietly in an orderly fashion at all times in connection with his alleged activities at or near Jones Commercial High School, referred to in plaintiff's complaint.

Paragraph 5: The Police Department of the City of Chicago has no evidence upon which to base any [38] belief that plaintiff will not conduct himself in a peaceful, orderly and quiet manner in the future if he is granted the relief which he seeks in this action.

Paragraph 6: The Police Department of the City of Chicago is not aware of any disturbance caused by or resulting from any conduct on the part of plaintiff which he alleged in his complaint.

Paragraph 7: At all times when plaintiff has engaged in the conduct alleged in the complaint, plaintiff has been either alone or at most with four or five other persons, peacefully walking near Jones Commercial High School carrying a sign or signs.

That is it, your Honor.

The Court: They are admitted into evidence.

Are there any comments by defense counsel?

Mr. Chambers: Your Honor, the City does have a motion. Essentially, the City fails to see where Mr. Mosley has been irreparably harmed in the enactment of this ordinance.

We feel that he has not shown the existence of an actual controversy between the parties, the City of Chicago and himself, as required by Article 3 of the United States Constitution, and Section 220 of the Judicial [39] Code, Title 28.

As the City stated before, he fails to have indicated any irreparable harm or injury that he has suffered as the result of the enactment of this ordinance.

Therefore, we ask for a directed verdict.

[C31] IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois

No. 68 C 1979

MOTION FOR DIRECT VERDICT IN THIS CAUSE OF ACTION FOR INJUNCTION AND DECLARATORY RELIEF.

(Filed Jun. 11, 1969)

Now come the defendants, Police Department of the City of Chicago, James B. Conlisk, Superintendent of the Police Department of the City of Chicago, and Richard J. Daley, Mayor of the City of Chicago, by their attorney, Raymond F. Simon, Corporation Counsel of Chicago, and move this Honorable Court for a directed verdict for the defendant since plaintiff's complaint and the evidence presented being materially and substantially defective in law and fact fails to state a cause of action upon which any relief can be granted for one or more of the following reasons:

[32] 1. The plaintiff has failed to show the existence of an actual case or controversy between the parties of the nature required by Article III of the United States Constitution and Section 220 of the Judicial Code, Title 28.

2. The plaintiff is not subject to any quasi criminal prosecution for the violation of Chapter 193 Section 1 (i) of the Municipal Code of the City of Chicago.

3. The complaint fails to indicate any irreparable harm or injury that this plaintiff has suffered.

4. Chapter 193 Section 1 (i) of the Municipal Code of the City of Chicago does not violate the First and Fourteenth Amendments.

5. Chapter 193 Section 1 (i) does not deny equal protection of the law to this plaintiff.

[C33-C49] • • •

[43-62] • • •

[63] UNITED STATES DISTRICT COURT.

Northern District of Illinois

Before the HONORABLE JOSEPH SAM PERRY.

Cause No. 68-C-1979 Date July 22, 1969

Title of Cause

Earl D. Mosley vs. Police Department of the City of Chicago, et al.

The court has considered the motion of defendants for a directed verdict with memorandum in support thereof, the plaintiff's memorandum in opposition thereto and defendants' reply and is of the opinion that said motion for a directed verdict should be granted.

The court continues the cause under advisement and orders the defendants to present within 10 days proposed Findings of Fact and Conclusions of Law and a final Decree herein.

/s/ J. S. PERRY.

[64-65] • • •

[67] IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

No. 68 C 1979

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came for trial on June 6, 1969 and the Court, having heard the evidence and considered the stipulation of the parties finds the facts and states the conclusions of law as follows:

Findings of Fact.

1. Earl D. Mosley, the plaintiff, prior to March 26, 1968, had repeatedly engaged in the peaceful picketing of Jones Commercial High School carrying a sign or walking in an orderly manner with four or five other persons carrying signs.

2. On March 26, 1968, the City Council of the City of Chicago passed the following ordinance:

> "A person commits disorderly conduct when he knowingly
>
> [68] Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute." Chapter 193 of The Municipal Code of the City of Chicago, Sec. 1 (i).

3. If the plaintiff walks peacefully and quietly in the public right of way during school sessions, as he did prior

to the enactment of the ordinance, plaintiff will be considered in violation of the ordinance and will be subject to arrest by agents of the Police Department of the City of Chicago, on the grounds that he is in violation of the ordinance.

4. The plaintiff therefore sought a Declaratory Judgment pursuant to Section 2201 of the Judicial Code Title 28 to determine the constitutionality of the ordinance.

Conclusions of Law.

1. The complainant properly sought a Declaratory Judgment pursuant to Section 2201 of the Judicial Code Title 28 to challenge the constitutionality of Chapter 193-1(i) of the Municipal Code of the City of Chicago since an actual case or controversy may arise without a citizen subjecting himself to arrest for the exercise of his immemorial First Amendment rights. The plaintiff's customary behavior of peacefully picketing Jones Commercial High School prior to March, 1968, [69] created a legal interest of such immediacy and reality as to enable him to challenge the constitutionality of the ordinance in a Federal court.

2. Section 193-1 of the Municipal Code of the City of Chicago does not violate Amendment I of the Constitution of the United States of America since it is a reasonable regulation as to time, place and manner. Rights of free speech and assembly, while fundamental in our democratic society, do not mean that everyone with opinions or beliefs to express may address a group at any public place at any time.

3. Section 193-1(i) of the Municipal Code of the City of Chicago does not violate Amendment XIV of the Constitution of the United States of America in that the

exemption of labor unions is a reasonable classification and the City has no right to regulate labor disputes as they are governed by Federal labor laws.

4. Section 193-1(i) of the Municipal Code of the City of Chicago is not unconstitutionally vague since the ordinance has reasonable and readily determinable standards.

5. This cause should be dismissed.

/s/ J. S. PERRY,
Judge.

Dated: Chicago, Illinois
August 19, 1969.

[70] IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

EARL D. MOSLEY,
Plaintiff,
vs.
POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, SUPERINTENDENT OF THE POLICE DEPARTMENT, ETC., AND RICHARD J. DALEY, MAYOR OF THE CITY OF CHICAGO,
Defendants.
No. 68 C 1979

ORDER.

This cause having come on for trial by the court without a jury, and the court having heard argument of counsel and being fully advised in the premises and having filed its findings of fact and conclusions of law simultaneously herewith,

It is Ordered, Adjudged and Decreed that the complaint herein for declaratory judgment be and it hereby is dismissed.

ENTER:

/s/ J. S. PERRY,
Judge.

Dated: Chicago, Illinois
August 19, 1969.

[71] • • •

[72] IN THE UNITED STATES DISTRICT COURT
• • (Caption—No. 68-C-1979) • •

NOTICE OF APPEAL.

Notice is hereby given that Earl D. Mosley, plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order of the District Court dismissing the plaintiff's complaint entered in this action on the 19th day of August, 1969.

/s/ DAVID GOLDBERGER,
David Goldberger,
One of the Attorneys for Earl D. Mosley.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

I, Elbert A. Wagner, Jr., Clerk of the United States District Court for the Northern District of Illinois, do hereby certify to the United States Court of Appeals, for the Seventh Circuit, that the documents submitted herewith and annexed hereto are the original papers filed and entered of record in my office, on the dates designated in the List of Documents, and together with a true copy of the docket entries as they appear in the official dockets in this office, and that these and One (1) Volume of the Clerk's File Copy of Transcript of Proceedings, transmitted herewith under separate certificate for the sake of convenience, constitute the Complete Record on Appeal in the cause entitled: Earl D. Mosley vs. Police Department of City of Chicago, et al., No. 68 C 1979.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 24th day of October, 1969.

ELBERT A. WAGNER, JR.,
Clerk.

By: /s/ BEVERLY V. PETERS,
Deputy Clerk.

(SEAL)

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

Thursday, October 29, 1970.

Before:

HON. JOHN S. HASTINGS, *Senior Circuit Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. OTTO KERNER, *Circuit Judge*

No. 18021

EARL D. MOSLEY,
Plaintiff-Appellant,

vs.

POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, Superintendent of the Police Department, etc., and RICHARD J. DALEY, Mayor of the City of Chicago,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUDGMENT ORDER.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and that this cause be, and it is hereby, REMANDED to the said District Court with directions to grant plaintiff the injunctive relief sought below, in accordance with the opinion of this Court filed this day.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

SEPTEMBER TERM, 1970—SEPTEMBER SESSION, 1970

No. 18021

EARL D. MOSLEY,
Plaintiff-Appellant,

vs.

POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, Superintendent of the Police Department of the City of Chicago, and RICHARD J. DALEY, Mayor of the City of Chicago,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 29, 1970

Before HASTINGS, *Senior Circuit Judge*, and KILEY and KERNER, *Circuit Judges*.

HASTINGS, *Senior Circuit Judge*. Earl D. Mosley brought this action in the federal district court against the City of Chicago Police Department, the Superintendent of the Chicago Police Department and the Mayor of Chicago seeking declaratory and injunctive relief, pursuant to Title 28 U. S. C. A. § 2201 and Title 42 U. S. C. A. § 1983, to enjoin the enforcement of Chapter 193-1(i) of the Chicago Municipal Code. He alleged in substance that the ordinance abridges his rights of freedom of speech, equal protection and due process guaranteed by the First and Fourteenth

Amendments to the United States Constitution. The district court granted defendant's motion for a directed verdict and to dismiss the complaint. Subsequently, the trial court filed its supporting findings of fact and conclusions of law and entered a decree of dismissal. Plaintiff appeals. We reverse.

From early September, 1967 to April 4, 1968, plaintiff, a federal postal employee, frequently walked upon the public sidewalk adjoining Jones Commercial High School in Chicago carrying a sign that read, "Jones High School practices black discrimination. Jones High School has a black quota."

On April 5, 1968, an amendment to the city's disorderly conduct ordinance became effective prohibiting any picketing or demonstrating on a public way within 150 feet of any primary or secondary school from one-half hour before school hours until one-half hour after school hours.[1] Plaintiff, upon seeing a newspaper announcement of the amendment, contacted the Chicago Police Department and upon inquiry was advised that he would be arrested if he continued to picket the school. Defendants admit that at all times plaintiff's actions were peaceful and orderly, that he never interrupted the free flow of traffic to and from the school and that they had no reason to believe his activities would lead to acts which were not peaceful, orderly and quiet.

The district court held the ordinance to be a reasonable

1. The Chapter 193-1(i) amendment provides:

"193-1 A person commits disorderly conduct when he knowingly:

* * *

(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school has been concluded, provided, however, that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute."

regulation as to time, manner and place of picketing and not violative of plaintiff's First Amendment rights. It also held the exemption of labor picketing to be a reasonable classification and not violative of the equal protection clause of the Fourteenth Amendment. The court further held the ordinance was not unconstitutionally vague since it had reasonable and readily determinable standards.

We consider first the alleged denial of plaintiff's right of free speech. He argues that Chapter 193-1(i), *supra,* is overbroad.

We think it clear that the ordinance is overbroad. It lays down a blanket prohibition against all forms of picketing or demonstrating (other than labor picketing) within 150 feet of a school no matter how peaceful, pristine or innocuous. It prohibits one man carrying a sign from walking on a public sidewalk adjoining a school, without condition or reservation.

It cannot be questioned that the protection of the First Amendment extends beyond "pure speech" and includes the peaceful expression of views by picketing, marching or demonstrating. *Shuttlesworth* v. *City of Birmingham,* 394 U. S. 147 (1969); *Cox* v. *State of Louisiana,* 379 U. S. 536 (1965); *Thornhill* v. *State of Alabama,* 310 U. S. 88 (1940). In *Thornhill,* the Court dealt with an Alabama statute making it unlawful for any person "without just cause or legal excuse" to "picket" a place of business for the purpose of injuring its lawful business. It expressly noted the statute prohibited a single individual from walking slowly and peacefully back and forth on a public sidewalk in front of the premises of an employer carrying a sign that stated only the fact that the employer did not employ union men. 310 U. S., at 98. The Court declared the scope of the statute too broad since it prohibited conduct that would not occasion imminent and aggravated danger to community interests and impaired the effectiveness of the exercise of the

right to freely discuss a matter of public concern, industrial relations.[2]

Defendants justify this ordinance as a reasonable attempt to prevent the disruption of schools and to forestall violence in an area of protest and demonstration by the creation of a 150 foot "buffer zone" during school hours. There can be no doubt that picketing, since it contains elements other than pure speech, may be the subject of reasonable regulation. *Hughes* v. *Superior Court*, 339 U. S. 460, 464 (1950).[3]

This principle was reaffirmed in *Cox* v. *State of Louisiana*, 379 U. S. 559 (1965), where the Court upheld a statute prohibiting picketing near a courthouse with the intent to obstruct justice for the reason that it was precise and was narrowly drawn to protect a valid state interest. *Accord*, *Cameron* v. *Johnson*, 390 U. S. 611 (1968).

Obviously, the City of Chicago could enact an ordinance to prevent the disruption of the educational process that would not violate plaintiff's right of free speech. This does

2. It cannot be seriously contended, in the context of the instant case, that the issue of race relations today is any less a matter of public concern than was industrial relations in 1940.

3. The examples of regulation of conduct normally associated with the exercise of First Amendment rights are numerous. *Hughes* upheld the state's right to prohibit picketing to enforce a specific demand for selective racial hiring. *Cox* v. *New Hampshire*, 312 U. S. 569 (1941), found a parade licensing scheme constitutional because the license could only be refused for considerations of public convenience. To the same effect is *Kovacs* v. *Cooper*, 336 U. S. 77 (1949) involving loudspeaker regulation. As was stated in *Cox* v. *State of Louisiana*, 379 U. S. 536, 554 (1965), "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." But always there must be a balance struck between the right of the individual to communicate and the rights of society. See, *e.g.*, *Shuttlesworth* v. *City of Birmingham, supra; Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc., infra; Thornhill* v. *State of Alabama, supra.*

not require unnecessarily broad proscription of activities constitutionally subject to state regulation. *N. A. A. C. P.* v. *State of Alabama,* 377 U. S. 288, 307 (1963); *Shelton* v. *Tucker,* 364 U. S. 479 (1960).

In the subject case where the sole question is right of access to a public way for the purpose of expression of views and where there is no danger of interference with a valid state interest,[4] plaintiff's First Amendment right to picket may not be constitutionally denied. *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.,* 391 U. S. 308 (1968). Here, as in *Thornhill* v. *State of Alabama, supra,* and *Davis* v. *Francois,* 5 Cir., 395 F. 2d 730 (1968), the instant ordinance did not evince any attempt to balance the individual's right to effective communication and the state's interest in peace and harmony. As was noted in *Amalgamated Food Employees, supra,* at 315, "* * * streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely."

We conclude that Chapter 193-1(i) denies absolutely plaintiff's right to express his views by the mere carrying of a sign as he walks upon the public sidewalk adjoining the school during school hours. It is, therefore, patently unconstitutional on its face.

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4. Defendants admitted that plaintiff's actions were at all times peaceful and that they had no reason to believe that his actions would lead to disruption. Indeed, all the ordinance requires for criminal liability is that a man walking on a public sidewalk adjoining a school be carrying a sign. There is no requirement, as in *Cox* v. *State of Louisiana,* 379 U. S. 559 (1965), of an intent to disrupt. There is no prerequisite, as in *Cameron* v. *Johnson, supra,* of an interference with ingress and egress. Nor is there any showing of a legitimate state interest requiring the proscription of any and all signs carried by pedestrians near schools.

Having determined that Chapter 193-1(i) is unconstitutional on its face, we do not deem it necessary to examine plaintiff's other constitutional contentions.

For the foregoing reasons, the judgment of the district court is reversed and this cause is ordered remanded with directions to grant plaintiff the injunctive relief sought below.

REVERSED AND REMANDED.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. .....

POLICE DEPARTMENT OF THE CITY OF CHICAGO, ET AL.,
Petitioners,

vs.

EARL D. MOSLEY.

Upon consideration of the application of counsel for petitioners,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 26, 1971.

/s/ THURGOOD MARSHALL,
Associate Justice of the Supreme Court of the United States.

January 20, 1971.

SUPREME COURT OF THE UNITED STATES

No. 70-87, October Term, 1971

POLICE DEPARTMENT OF THE CITY OF CHICAGO, ET AL.,
Petitioners,

vs.

EARL D. MOSLEY,

ORDER ALLOWING CERTIORARI. Filed October 12, 1971.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is consolidated with No. 70-5106 and a total of one hour is allotted for oral argument.

FILE COPY

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~1-995~~ 70-87

POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, SUPERINTENDENT OF THE POLICE DEPARTMENT OF THE CITY OF CHICAGO, AND RICHARD J. DALEY, MAYOR OF THE CITY OF CHICAGO,

Petitioners,

vs.

EARL D. MOSLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. ____.

POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, SUPERINTENDENT OF THE POLICE DEPARTMENT OF THE CITY OF CHICAGO, AND RICHARD J. DALEY, MAYOR OF THE CITY OF CHICAGO,

Petitioners,

vs.

EARL D. MOSLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioners Police Department of the City of Chicago, James B. Conlisk, Superintendent of the Police Department of the City of Chicago, and Richard J. Daley, Mayor of the City of Chicago, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 29, 1970.

OPINIONS BELOW.

The opinion of the Court of Appeals filed on October 29, 1970, is reported at 432 F. 2d 1256 (1970) and is reproduced in Appendix A to this Petition.

The findings of fact and conclusions of law and the order entered by the District Court on August 19, 1969, are unreported, but are reproduced in Appendix B to this Petition.

The opinion of the Illinois Supreme Court in *City of Rockford v. Grayned*—which is in direct conflict with the opinion of the Court of Appeals here sought to be reviewed—is reported at 46 Ill. 2d 486 (1970) and is reproduced in Appendix C to this Petition.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 29, 1970 (Appendix A). On January 20, 1971, an order was entered by Mr. Justice Marshall, Associate Justice of this Court and Circuit Justice for the Seventh Circuit, extending the time for filing a petition for writ of certiorari herein to and including February 26, 1971. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether Section 193-1(i) of the Municipal Code of Chicago, Illinois, by prohibiting picketing and demonstrating on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school has been concluded, violates the guarantee of freedom of speech established by the First Amendment to the Constitution of the United States.

2. Whether the same ordinance, by exempting from its restrictions "the peaceful picketing of any school involved in a labor dispute," violates the equal protection of the law guaranty of the Fourteenth Amendment.

3. Whether the same ordinance, by reason of vagueness, denies due process of law in violation of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED.

I. CONSTITUTION OF THE UNITED STATES, AMENDMENT I:

"Congress shall make no law . . . abridging the freedoom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II. UNITED STATES CODE, TITLE 42:

"§*1983. Civil action for deprivation of rights.*

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

III. MUNICIPAL CODE OF CHICAGO, ILLINOIS, SECTION 193-1(i):

"193.1 A person commits disorderly conduct when he knowingly:

"* * *

"(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school has been concluded, provided, however, that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute."

IV. CODE OF ORDINANCES OF THE CITY OF ROCKFORD, ILLINOIS, SECTION 18.1(i):

"A person commits disorderly conduct when he knowingly:

"• • •

"(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute; . . ."

STATEMENT OF THE CASE.

This suit was filed on October 23, 1968 under 28 U. S. C. A. § 2201 and 42 U. S. C. A. § 1983, for declaratory and injunctive relief against enforcement of Section 193-1(i) of the Municipal Code of Chicago, Illinois. That ordinance provides:

> "193-1 A person commits disorderly conduct when he knowingly:
>
> "* * *
>
> "(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school has been concluded, provided, however, that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute."

The respondent alleged that this ordinance abridged his rights of freedom of speech, equal protection and due process guaranteed by the First and Fourteenth Amendments to the United States Constitution.

This ordinance had been enacted on March 26, 1968, by way of amendment to the City's disorderly conduct ordinance and became effective on April 5, 1968. It was passed against a background of widespread disorders and considerable violence occurring at that time in, near and around public schools and high schools (as well as colleges and universities), which are matters of common knowledge.

Since early September, 1967 and until April 4, 1967, plaintiff had been picketing on a public sidewalk adjoining Jones Commercial High School in Chicago (A. 15, 16, 17, 18, 29, 57). He had been in the habit of coming there

after his working hours as a postal employee and of pacing back and forth carrying "a big picket sign" that said (A. 18):

> "Jones High School practices black discrimination. Jones High School has a black quota."

Respondent's objective was to force the Chicago Board of Education to make Jones Commercial High School "half black" (A. 16). His committee had presented that demand to the associate superintendent of schools in charge of vocational education (*id.*). At the trial respondent asserted that, according to Board of Education "head counts," there were, "as we sit here right now" (June 6, 1969), 1006 students at Jones Commercial High School, of whom 742 were white, 240 black and 20 Puerto Rican (A. 17). He further claimed that of the black students "less than 100" would graduate. There was no showing that not more than 100 out of 240 is an unduly small percentage of graduations. On cross-examination, respondent admitted (A. 26):

> "No, I could not say that any black student has been denied enrollment at Jones Commercial High School."

It is not, however, contended that respondent's picketing was violent or other than peaceful.

Upon reading in a newspaper of the enactment of the ordinance here in question, respondent inquired of the Human Relations Section of the Police Department (A. 19), a desk sergeant at the nearest stationhouse (A. 21) and the city law department as to the ordinance's applicability to his picketing activities. He was informed that he would have to observe the limitations required by the ordinance in his picketing and that, if he did not, he would be arrested.

Thereupon, respondent stopped picketing and instituted

this action for declaratory and injunctive relief on October 23, 1968 (A. 1).

At the trial in the District Court on June 6, 1969 (A. 56), at the close of respondent's case, the trial judge granted petitioner's motion for a directed verdict (A. 56). In its findings of fact and conclusions of law (A. 56-58), the court ruled that this is a proper proceeding for declaratory judgment and that respondent has standing to bring the action. As to the merits, the District Court held (A. 58):

> "Section 193-1 of the Municipal Code of the City of Chicago does not violate Amendment I of the Constitution of the United States of America since it is a reasonable regulation as to time, place and manner. Rights of free speech and assembly, while fundamental in our democratic society, do not mean that everyone with opinions or beliefs to express may address a group at any public place at any time."

The court also found that the ordinance is not unconstitutionally vague and that the exemption of labor unions is a reasonable classification and does not violate the Fourteenth Amendment. A judgment order dismissing the action was entered by the District Court on August 19, 1969 (A. 59).

In reversing this judgment, the Court of Appeals came to the conclusion (Appendix A, p. 3) that:

> "We think it clear that the ordinance is overbroad. It lays down a blanket prohibition against all forms of picketing or demonstrating (other than labor picketing) within 150 feet of a school no matter peaceful, pristine or innocuous. It prohibits one man carrying a sign from walking on a public sidewalk adjoining a school, without condition or reservation."

In arriving at this result, the Court of Appeals may have been influenced by a misunderstanding of the City's position. The opinion states (Appendix A, p. 2) that "Defend-

ants admit that at all times plaintiff's actions were peaceful and orderly, that he never interrupted the free flow of traffic to and from the school and that they had no reason to believe his activities would lead to acts which were not peaceful, orderly and quiet." In reality, the City's position was and is that, although respondent was peaceful and did not block traffic, there was a serious likelihood that, in this period, his activities might lead to acts which were not peaceful, orderly and quiet. The City also urged that the ordinance was calculated to prevent distraction from and interference with the students—for the most part, children and immature persons—in pursuing their studies, and that, therefore, the enactment was grounded in the State's legitimate interest in furthering public education.

The Court of Appeals deemed it unnecessary to examine respondent's other constitutional contentions (Appendix A, p. 5)—*i.e.*, that the ordinance denied due process, because of vagueness, and violated the equal protection clause, because it exempted labor picketing.

REASONS FOR GRANTING THE WRIT.

I. THE DECISION BELOW IS IN CONFLICT WITH A RECENT DECISION OF THE ILLINOIS SUPREME COURT.

In *City of Rockford* v. *Grayned,* 46 Ill. 2d 486 (1970), the Illinois Supreme Court on September 29 of last year upheld the validity of Section 18.1 (i) of the Code of Ordinances of the City of Rockford, Illinois. (The opinion in *Grayned* is reproduced in Appendix C.) The Rockford measure provides (at 490):

> "A person commits disorderly conduct when he knowingly:
>
> "* * *
>
> "(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before school is in session and one-half hour after the school session has been concluded, provided that the subsection does not prohibit the peaceful picketing of any school involved in a labor dispute; . . ."

This Rockford ordinance, upheld by the Illinois Supreme Court in *Grayned,* is word for word the same as the Chicago ordinance declared invalid by the Seventh Circuit in the case at bar (except that the Rockford ordinance adds the word "session" in stating "after the school session has been concluded").

In sustaining the above-quoted Rockford provision and another related ordinance of the same city, the Illinois Supreme Court declared (at 488) that "[i]t cannot be doubted that the State has a legitimate interest in preserving the peace and good order of its school system," citing *Brown* v. *Louisiana,* 383 U. S. 131 (1966), and *Cox* v.

Louisiana, 379 U. S. 559, at 574 (1965). The Illinois court also stated (*ibid.*) that "[w]hile the ordinance may be susceptible to unconstitutional application, its constitutionality does not depend on conjectured misapplication."*

Thus, there exists a direct conflict between a decision of a Court of Appeals and a decision of a highest state court, in a state within the same circuit, as to the validity of identical municipal ordinances on federal constitutional questions. This conflict is a valid reason justifying a grant of certiorari to review the judgment below. In the words of John Rutledge of South Carolina at the Constitutional Convention, the purpose of the establishment of one supreme national tribunal was "to secure the national rights & uniformity of Judgmts."

II. THE INVALIDATION BELOW OF MUNICIPAL LEGISLATION DESIGNED TO CREATE A MODEST, RESTRICTED BUFFER ZONE AROUND PUBLIC SCHOOLS DURING SCHOOL HOURS, SO AS TO PROTECT THE EDUCATIONAL PROCESS FROM DISTRACTION AND POSSIBLE VIOLENCE, IS OF SUFFICIENT IMPORTANCE TO MERIT REVIEW BY THIS COURT.

The Court of Appeals held the Chicago ordinance "overbroad." (Appendix A, p. 3.) It did recognize that "picketing . . . contains elements other than pure speech" and may be the subject of reasonable regulation, in which connection it cited *Hughes* v. *Superior Court,* 339 U. S. 460, 464 (1950). But the court below in effect agreed with respondent's position that so long as picketing is nonviolent and is not carried on for an illegal purpose, the time and place of the picketing cannot be regulated.

* The Illinois court also found (at 49) the exemption of peaceful picketing of a school in a labor dispute was a reasonable classification and not unconstitutional. This issue was raised and argued in the case at bar, but was not reached in the opinion of the Court of Appeals.

It was and is the petitioner City's position that regulation of the time and place of otherwise lawful picketing is constitutional if the regulation is reasonably related to a legitimate state interest. In this regard, the City cited *Cox* v. *Louisiana*, 379 U. S. 536 (1965), and the oft quoted language (at 554, 555):

> "The constitutional guaranty of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor, could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly."

The right of local governments to regulate the public order and traffic aspects of constitutionally protected communication of ideas—particularly by means of demonstrations and marches—has been repeatedly recognized and upheld by this Court. It was this right which the Illinois Supreme Court invoked in *Grayned* in upholding the Rockford ordinances.

The Chicago ordinance, petitioners submit, is a reasonable measure designed to prevent the disruption of schools and to forestall violence in an era of violent demonstrations by the creation of a 150 foot "buffer zone" during school hours.

150 feet is no great distance. It does not keep the students from knowing that a demonstration is going on. If

students are interested, they can at suitable times examine into it more closely and participate, if they so desire. But the distance of 150 feet does tend to assure that the primary interest of students generally—acquiring an education and credits and diplomas—will be protected from distraction and interference.

The 150 foot buffer zone also aids the police in forestalling violence, since those bent on violence will make even shorter shrift of the distance limitation. Encroachment over the boundary serves to alert the police against the possibility of more serious transgressions.

The ordinance does not prohibit speech within 150 feet of a school during school hours, except the non-pure form of speech that is picketing and demonstrating. The ordinance does not probihit conversation, or even speechmaking, at the places and times specified. It does not prohibit the distribution of leaflets at such times and places. The ordinance prohibits only picketing and demonstrations and prohibits them only within narrow limits.

Picketing is speech plus other elements. The opinion of the Court of Appeals acknowledged this (Appendix A, pp. 3, 4). This Court had made very clear in *Hughes* v. *Superior Court of California*, 339 U. S. 460, at 464, 465 (1950) that:

> "[W]hile picketing is a mode of communication it is inseparably something more and different . . . [t]he very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and enacted by picket lines are unlike those flowing by appeals by printed word."

The picket line elicits powerful conditioned responses, both favorable and unfavorable. Demonstrations are mass psychology situations educing hypersuggestibility.

The Court of Appeals misconceived the instant case as

one "where the sole question is right of access to a public way for the purpose of expression of views and where there is no danger of interference with a valid state interest" (Appendix A, p. 4). The interest of the state here at stake is its paramount interest in conducting public education of large numbers of children and immature persons free from distraction and possible violence.

It is a distortion of the facts to dwell upon the fortuitous circumstance that the particular individual who filed this test action for declaratory judgment conducted himself peaceably, and to ignore the background of widespread violent demonstrations at and in schools, much of it engaged in by the students themselves, in response to which this legislation was enacted.

The ordinance was narrowly drafted to effectuate weighty and urgent public purposes. Persons sincerely interested in education encounter nothing unreasonable in the modest restrictions of this precautionary measure. It should be upheld. Recognition of such an ordinance's validity is of sufficient public importance to merit such action by this Court.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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February 18, 1971.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term, 1970—September Session, 1970

No. 18021

EARL D. MOSLEY,
Plaintiff-Appellant,

v.

POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, Superintendent of the Police Department of the City of Chicago, and RICHARD J. DALEY, Mayor of the City of Chicago,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 29, 1970

Before HASTINGS, *Senior Circuit Judge,* and KILEY and KERNER, *Circuit Judges.*

HASTINGS, *Senior Circuit Judge.* Earl D. Mosley brought this action in the federal district court against the City of Chicago Police Department, the Superintendent of the Chicago Police Department and the Mayor of Chicago seeking declaratory and injunctive relief, pursuant to Title 28 U. S. C. A. § 2201 and Title 42 U. S. C. A. § 1983, to enjoin the enforcement of Chapter 193-1(i) of the Chicago Municipal Code. He alleged in substance that the ordinance

abridges his rights of freedom of speech, equal protection and due process guaranteed by the First and Fourteenth Amendments to the United States Constitution. The district court granted defendant's motion for a directed verdict and to dismiss the complaint. Subsequently, the trial court filed its supporting findings of fact and conclusions of law and entered a decree of dismissal. Plaintiff appeals. We reverse.

From early September, 1967 to April 4, 1968, plaintiff, a federal postal employee, frequently walked upon the public sidewalk adjoining Jones Commercial High School in Chicago carrying a sign that read, "Jones High School practices black discrimination. Jones High School has a black quota."

On April 5, 1968, an amendment to the city's disorderly conduct ordinance became effective prohibiting any picketing or demonstrating on a public way within 150 feet of any primary or secondary school from one-half hour before school hours until one-half hour after school hours.[1] Plaintiff, upon seeing a newspaper announcement of the amendment, contacted the Chicago Police Department and upon inquiry was advised that he would be arrested if he continued to picket the school. Defendants admit that at all times plaintiff's actions were peaceful and orderly, that he never interrupted the free flow of traffic to and from the school and that they had no reason to believe his activities would lead to acts which were not peaceful, orderly and quiet.

---

1. The Chapter 193-1(i) amendment provides:

"193-1 A person commits disorderly conduct when he knowingly: • • •

(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school has been concluded, provided, however, that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute."

The district court held the ordinance to be a reasonable regulation as to time, manner and place of picketing and not violative of plaintiff's First Amendment rights. It also held the exemption of labor picketing to be a reasonable classification and not violative of the equal protection clause of the Fourteenth Amendment. The court further held the ordinance was not unconstitutionally vague since it had reasonable and readily determinable standards.

We consider first the alleged denial of plaintiff's right of free speech. He argues that Chapter 193-1(i), *supra*, is overbroad.

We think it clear that the ordinance is overbroad. It lays down a blanket prohibition against all forms of picketing or demonstrating (other than labor picketing) within 150 feet of a school no matter how peaceful, pristine or innocuous. It prohibits one man carrying a sign from walking on a public sidewalk adjoining a school, without condition or reservation.

It cannot be questioned that the protection of the First Amendment extends beyond "pure speech" and includes the peaceful expression of views by picketing, marching or demonstrating. *Shuttlesworth* v. *City of Birmingham*, 394 U. S. 147 (1969); *Cox* v. *State of Louisiana*, 379 U. S. 536 (1965); *Thornhill* v. *State of Alabama*, 310 U. S. 88 (1940). In *Thornhill*, the Court dealt with an Alabama statute making it unlawful for any person "without just cause or legal excuse" to "picket" a place of business for the purpose of injuring its lawful business. It expressly noted the statute prohibited a single individual from walking slowly and peacefully back and forth on a public sidewalk in front of the premises of an employer carrying a sign that stated only the fact that the employer did not employ union men. 310 U. S., at 98. The Court declared the scope of the statute too broad since it prohibited conduct that would not occasion imminent and aggravated danger to community inter-

ests and impaired the effectiveness of the exercise of the right to freely discuss a matter of public concern, industrial relations.[2]

Defendants justify this ordinance as a reasonable attempt to prevent the disruption of schools and to forestall violence in an era of protest and demonstration by the creation of a 150 foot "buffer zone" during school hours. There can be no doubt that picketing, since it contains elements other than pure speech, may be the subject of reasonable regulation. *Hughes* v. *Superior Court*, 339 U. S. 460, 464 (1950).[3]

This principle was reaffirmed in *Cox* v. *State of Louisiana*, 379 U. S. 559 (1965), where the Court upheld a statute prohibiting picketing near a courthouse with the intent to obstruct justice for the reason that it was precise and was narrowly drawn to protect a valid state interest. *Accord*, *Cameron* v. *Johnson*, 390 U. S. 611 (1968).

Obviously, the City of Chicago could enact an ordinance to prevent the disruption of the educational process that would not violate plaintiff's right of free speech. This does

2. It cannot be seriously contended, in the context of the instant case, that the issue of race relations today is any less a matter of public concern than was industrial relations in 1940.

3. The examples of regulation of conduct normally associated with the exercise of First Amendment rights are numerous. *Hughes* upheld the state's right to prohibit picketing to enforce a specific demand for selective racial hiring. *Cox* v. *New Hampshire*, 312 U. S. 569 (1941), found a parade licensing scheme constitutional because the license could only be refused for considerations of public convenience. To the same effect is *Kovacs* v. *Cooper*, 336 U. S. 77 (1949), involving loudspeaker regulation. As was stated in *Cox* v. *State of Louisiana*, 379 U. S. 536, 554 (1965), "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." But always there must be a balance struck between the right of the individual to communicate and the rights of society. See, *e.g.*, *Shuttlesworth* v. *City of Birmingham*, *supra*; *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, *infra*; *Thornhill* v. *State of Alabama*, *supra*.

not require unnecessarily broad proscription of activities constitutionally subject to state regulation. *N.A.A.C.P.* v. *State of Alabama*, 377 U. S. 288, 307 (1963); *Shelton* v. *Tucker*, 364 U. S. 479 (1960).

In the subject case where the sole question is right of access to a public way for the purpose of expression of views and where there is no danger of interference with a valid state interest,[4] plaintiff's First Amendment right to picket may not be constitutionally denied. *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968). Here, as in *Thornhill* v. *State of Alabama, supra*, and *Davis* v. *Francois*, 5 Cir., 395 F. 2d 730 (1968), the instant ordinance did not evince any attempt to balance the individual's right to effective communication and the state's interest in peace and harmony. As was noted in *Amalgamated Food Employees, supra*, at 315, "* * * streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely."

We conclude that Chapter 193-1(i) denies absolutely plaintiff's right to express his views by the mere carrying of a sign as he walks upon the public sidewalk adjoining the school during school hours. It is, therefore, patently unconstitutional on its face.

---

4. Defendants admitted that plaintiff's actions were at all times peaceful and that they had no reason to believe that his actions would lead to disruption. Indeed, all the ordinance requires for criminal liability is that a man walking on a public sidewalk adjoining a school be carrying a sign. There is no requirement, as in *Cox* v. *State of Louisiana*, 379 U. S. 559 (1965), of an intent to disrupt. There is no prerequisite, as in *Cameron* v. *Johnson, supra*, of an interference with ingress and egress. Nor is there any showing of a legitimate state interest requiring the proscription of any and all signs carried by pedestrians near schools.

Having determined that Chapter 193-1(i) is unconstitutional on its face, we do not deem it necessary to examine plaintiff's other constitutional contentions.

For the foregoing reasons, the judgment of the district court is reversed and this cause is ordered remanded with directions to grant plaintiff the injunctive relief sought below.

REVERSED AND REMANDED.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 68-C-1979) * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came for trial on June 6, 1969 and the Court, having heard the evidence and considered the stipulation of the parties finds the facts and states the conclusions of law as follows:

Findings of Fact.

1. Earl D. Mosley, the plaintiff, prior to March 26, 1968, had repeatedly engaged in the peaceful picketing of Jones Commercial High School carrying a sign or walking in an orderly manner with four or five other persons carrying signs.

2. On March 26, 1968, the City Council of the City of Chicago passed the following ordinance:

> "A person commits disorderly conduct when he knowingly
>
> Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute," Chapter 193 of The Municipal Code of the City of Chicago, Sec. 1(i).

3. If the plaintiff walks peacefully and quietly in the public right of way during school sessions, as he did prior

to the enactment of the ordinance, plaintiff will be considered in violation of the ordinance and will be subject to arrest by agents of the Police Department of the City of Chicago, on the grounds that he is in violation of the ordinance.

4. The plaintiff therefore sought a Declaratory Judgment pursuant to Section 2201 of the Judicial Code Title 28 to determine the constitutionality of the ordinance.

Conclusions of Law.

1. The complainant properly sought a Declaratory Judgment pursuant to Section 2201 of the Judicial Code Title 28 to challenge the constitutionality of Chapter 193-1(i) of the Municipal Code of the City of Chicago since an actual case or controversy may arise without a citizen subjecting himself to arrest for the exercise of his immemorial First Amendment rights. The plaintiff's customary behavior of peacefully picketing Jones Commercial High School prior to March, 1968, created a legal interest of such immediacy and reality as to enable him to challenge the constitutionality of the ordinance in a Federal court.

2. Section 193-1 of the Municipal Code of the City of Chicago does not violate Amendment I of the Constitution of the United States of America since it is a reasonable regulation as to time, place and manner. Rights of free speech and assembly, while fundamental in our democratic society, do not mean that everyone with opinions or beliefs to express may address a group at any public place at any time.

3. Section 193-1(i) of the Municipal Code of the City of Chicago does not violate Amendment XIV of the Constitution of the United States of America in that the exemption of labor unions is a reasonable classification

and the City has no right to regulate labor disputes as they are governed by Federal labor laws.

4. Section 193-1(i) of the Municipal Code of the City of Chicago is not unconstitutionally vague since the ordinance has reasonable and readily determinable standards.

5. This cause should be dismissed.

/s/ J. S. Perry,
Judge.

Dated: Chicago, Illinois
August 19, 1969.

UNITED STATES DISTRICT COURT.

* * (Caption—No. 68-C-1979) * *

ORDER.

This cause having come on for trial by the court without a jury, and the court having heard argument of counsel and being fully advised in the premises and having filed its findings of fact and conclusions of law simultaneously herewith,

It is Ordered, Adjudged and Decreed that the complaint herein for declaratory judgment be and it hereby is dismissed.

/s/ J. S. Perry,
Judge.

APPENDIX C.

(No. 42895.—Judgment affirmed.)

THE CITY OF ROCKFORD, Appellee, *vs.* RICHARD GRAYNED, Appellant.

Opinion filed September 29, 1970.

Mr. JUSTICE WARD delivered the opinion of the court:

On April 25, 1969, a demonstration was held in front of a high school in the city of Rockford. Richard Grayned, the defendant here, and 40 other demonstrators were arrested. A jury in the circuit court of Winnebago County found the defendant guilty of having violated, in April, 1969, sections 19.2(a) and 18.1(i) of the Code of the City of Rockford and he was fined $25 for each violation. A challenge to the constitutionality of these ordinances has been raised which gives this court jurisdiction on direct appeal.

Section 19.2(a) provides, insofar as is pertinent: "That no person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof * * *."

The defendant first argues that this ordinance is unconstitutional on its face because its "terms are so vague that they fail to give the notice [of what conduct is prohibited] required by the Due Process Clause of the Fourteenth Amendment, and are so broad as to condemn the exercise of First Amendment freedoms." He complains relatedly that the ordinance vests unlimited discretion in law enforcement officials to determine the prohibited con-

duct. We have recently considered and sustained the constitutionality of ordinances and statutes which have been challenged on grounds of being vague and overly broad, including the grounds, which are complained of here, that proscribed conduct was not sufficiently specified and that police were given too broad a discretion in determining whether conduct was proscribed. (See *City of Chicago* v. *Fort*, 46 Ill. 2d 12; *City of Chicago* v. *Meyer*, 44 Ill. 2d 1; *City of Chicago* v. *Lawrence*, 42 Ill. 2d 461; *People* v. *Raby*, 40 Ill. 2d 392.) Much of what we said there has application here and there is no necessity of repetitious or extended discussion. We do observe that while the defendant charges that terms appearing in the ordinance such as "noise" and "diversion" lack constitutional precision and are too indefinite, terms such as "alarm," "disturb," "interfere with," and "hinder" have been determined by us to comply with the constitutional requirements of specificity. (*City of Chicago* v. *Lawrence*, 42 Ill. 2d 461; *People* v. *Raby*, 40 Ill. 2d 392.) The terms here are not constitutionally objectionable.

It cannot be doubted that the State has a legitimate interest in preserving the peace and good order of its school system. (*Cf. Brown* v. *Louisiana*, 383 U. S. 131, 143, 15 L. Ed. 2d 637, 646, 86 S. Ct. 719; *Cox* v. *Louisiana*, 379 U. S. 559, 574, 13 L. Ed. 2d 487, 498, 85 S. Ct. 476.) While the ordinance may be susceptible to unconstitutional application, its constitutionality does not depend on conjectured misapplication. (*People* v. *Raby*, 40 Ill. 2d 392, 397; *Landry* v. *Daley* (N. D. Ill. 1968), 280 F. Supp. 938, 960.) Although the argument that the ordinance has been unconstitutionally applied is not advanced in this case, our stated position is that we shall deal with extreme circumstances which might cause an unconstitutional application of an ordinance "if and when they arise." (*City of Chicago* v. *Fort*, No. 41945.) Our conclusion here is that the ordinance in question on its face is "a valid law dealing with conduct

subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection." (*Cf. Cox* v. *Louisiana,* 379 U. S. 559, 564; 13 L. Ed. 2d 487, 492.)

It is next contended that section 19.2(a) is void because the penalty provisions applicable to the ordinance would exceed the power to impose penalties granted to municipalities by the legislature. Since section 19.2(a) itself does not contain a provision for a penalty, the general penalty section of the Code of Ordinances applies. That section (City of Rockford Code of Ordinances, ch. 28, sec. 1.8) provides, so far as is pertinent: "It shall be unlawful for any person to violate or fail to comply with any provision of this Code and where no specific penalty is provided therefor, the violator shall be punished by a fine not less than ten dollars and not exceeding two hundred dollars or imprisonment for a term not exceeding six months or by both such fine or imprisonment * * *."

The power of a municipality to provide for fines or penalties, as of the date of the violation here, did not include any authority to jail an offender, excepting the authority to jail in the event of failure to satisfy a fine or costs. (Ill. Rev. Stat. 1967, ch. 24, par. 1—2—1, par. 1—2—9.) Since a municipality can legislate only upon or with reference to that which has been authorized by the General Assembly (*People ex. rel. Skokie Town House Builders, Inc.* v. *Village of Morton Grove,* 16 Ill. 2d 183, 189), that portion of the Rockford ordinance which provided for incarceration attempted to exceed the conferred authority. We consider, however, that this defect does not affect the remainder of the penalty section, that is, section 1.8 absent the power to jail provision, or the section defining the substantive violation, that is, section 19.2(a). In *Brown* v. *City of Chicago,* 42 Ill. 2d 501, 505, we said: "If what remains

after the invalid portion is striken is complete in itself and capable of being executed wholly independently of that which is rejected, the invalid portion does not render void the entire ordinance unless it can be said that the city council would not have passed it with the invalid portion eliminated." We judge that the remainder of the ordinance is complete in itself and capable of being independently executed.

The last contention of the defendant is that his conviction for disorderly conduct under section 18.1(i) of the Rockford Code must be set aside for the reason that this section effects an unreasonable and arbitrary classification violative of the first and fourteenth amendments of the United States Constitution. The ordinance says: "A person commits disorderly conduct when he knowingly: * * * (i) Pickets or demonstrates on a public way within ten feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute; * * *." Rockford Code of Ordinances, ch. 28, sec. 18.1(i).

The defendant's complaint is directed at the part of the ordinance which provides that the peaceful picketing of a school involved in a labor dispute is not prohibited. However, we do not regard the classification in the ordinance as arbitrary. While a classification cannot, of course, be arbitrary, this court has said: "In order to authorize a judicial review of such classifications it must clearly appear that there is no fair reason for the law that would not require with equal force its extension to others not included. The legislature may determine upon what differences a distinction may be made for the purpose of statutory classification, between provisions otherwise having resemblance, if

such power is not arbitrarily exercised and the distinction has a reasonable basis." (*Bagdonas* v. *Liberty Land and Investment Co.*, 309 Ill. 103, 109.) Too, we said in *People ex rel. Conservation District* v. *Lenover*, 43 Ill. 2d 209, 219: "The burden of proving the arbitrariness of a classification is on the one who challenges it." And, at page 217: "Only if it can be said that the classification is clearly unreasonable and palpably arbitrary will a court declare the statute invalid." We cannot say that the city council of Rockford acted arbitrarily here in making the classification. Whether the council considered that the livelihood of persons involved in a labor dispute would typically be concerned or that it was familiar with the usual form of labor picketing or whether other considerations led to the classification we cannot say. But we can say it would be arbitrary for us to conclude from this distance under the circumstances that the act of the city was one of arbitrary discrimination.

The defendant would have us adopt the view of Justice Black in a concurring opinion in *Cox* v. *Louisiana*, 379 U. S. 559, 581, 13 L. Ed. 2d 487 at 502. There he said that he regarded a statute's exemption of picketing and assembly by labor unions in protest of unfair treatment from the statute's operation as invidious discrimination. However, it must be observed that the expression was that of a single justice, not that of the court. The court's decision on the point rested on other grounds.

Too, the statute there was a broad one, relating to the obstruction of public passageways, including streets, sidewalks and public buildings and it provided that labor organizations were exempt from its application. Justice Black considered that the statute was "trying to prescribe by law what matters of public interest people whom it allows on the streets may or not discuss." (379 U. S. at 581, 13 L. Ed. 2d at 502.) The statute here is a narrow one relating only to picketing or demonstrating within 150 feet of a school in

session which is involved in a labor dispute. It does not have a potential consequence as the one Justice Black condemned.

Accordingly, the judgment of the circuit court of Winnebago County is affirmed.

Judgment affirmed.

Mr. JUSTICE SCHAEFFER, dissenting:

In my opinion section 18.1(i) of the Code makes arbitrary discrimination when it prohibits picketing on a public way within 150 feet of any school building but exempts the peaceful picketing of any school involved in a labor dispute. The considerations suggested in the opinion of the majority are not persuasive, and I am unable to conceive of any reason which would justify the discrimination effected by the ordinance.

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70-87
No. 1303

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1970.

POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, SUPERINTENDENT OF THE POLICE DEPARTMENT OF THE CITY OF CHICAGO, AND RICHARD J. DALEY, MAYOR OF THE CITY OF CHICAGO,

Petitioners,

vs.

EARL D. MOSLEY,

Respondent.

BRIEF OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HARVEY J. BARNETT
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970.

No. 1393

POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, SUPERINTENDENT OF THE POLICE DEPARTMENT OF THE CITY OF CHICAGO, AND RICHARD J. DALEY, MAYOR OF THE CITY OF CHICAGO,

Petitioners,

vs.

EARL D. MOSLEY,

Respondent.

BRIEF OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I. STATEMENT OF THE CASE

A. FACTS.

Respondent sets forth the salient facts of this case because of certain inaccuracies and misleading statements in the Petition for a Writ of Certiorari.

In early September, 1967, Respondent, Earl D. Mosley, began to peacefully walk on the public sidewalks adjoining Jones Commercial High School in Chicago, Illinois, carrying a sign which stated that Jones Commercial

High School discriminated on the basis of race. (15, 16, 17, 18, 29, 57)* On March 26, 1968, the City of Chicago enacted an amendment to its existing ordinances that made this form of peaceful picketing disorderly conduct. (57) The amendment reads as follows:

> "193-1 A person commits disorderly conduct when he knowingly: * * *
>
> (i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school has been concluded, provided, however, that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute."

Respondent testified to his motive for engaging in this picketing. He stated that he was concerned about the quality of education for Blacks and he was of the belief that Jones Commercial High School was discriminating against Black students in its admission policies and in the treatment that it afforded them.** After his repeated discussions with officials with respect to discrimination at Jones Commercial High School proved unsuccessful, Respondent turned to peacefully picketing the school, generally in the afternoon, either by himself or with a few other persons.

At the trial of this case, Petitioners admitted that *at all times* Respondent's activities were peaceful and orderly. (28, 29) They further admitted that his picketing

---

* References are to Appendix of Record

** Whether Respondent's opinions were well-founded in fact is not, and has never been, an issue or relevant in this case, and the comments and insinuations to the contrary on Page 7 of the Petition are clearly inapposite and inappropriate.

never interrupted the free flow of traffic to and from the school and that they had no reason to believe that Respondent's activities would lead to acts which were not peaceful, orderly and quiet. (28, 29) Furthermore, at no stage during these proceedings did Petitioners ever take the position that there was a "serious likelihood" that Respondent's activity "might lead to acts which were not peaceful, orderly and quiet" as they now state on Page 9 of the Petition. Indeed, Petitioners admitted to the contrary, as noted above.

After the passage of the ordinance, Respondent contacted the Chicago Police and the City's Corporation Counsel. (19, 21) He was advised that he would be arrested if he continued to picket the high school. (19, 20) Respondent was never actually prosecuted for a violation of the ordinance, but Petitioners admitted that if he continued his activities in picketing the school, he would be arrested. (28, 29)

Respondent sought a declaratory judgment and an injunction to prevent the enforcement of this ordinance on the grounds that it violated his First Amendment right to freedom of speech, and that it was a violation of the Equal Protection and Due Process Clause of the Fourteenth Amendment.

The District Court held that this was a proper proceeding for a declaratory judgment, and held that the ordinance was constitutional in all respects.

On appeal to the Seventh Circuit Court of Appeals, there were no disputed questions of fact; the only issue was whether the ordinance was unconstitutional on its face. On October 29, 1970, the Court of Appeals reversed the District Court and held that the Ordinance violated the First Amendment right to freedom of speech.

because the ordinance was overly broad and granted the relief sought by Respondent. The Court of Appeals did not deem it necessary to consider Respondent's other contentions as to why the ordinance was unconstitutional.

B. DECISION IN CITY OF ROCKFORD VS. GRAYNED AND PRESENT STATUS OF ILLINOIS LAW.

On September 29, 1970, the Supreme Court of Illinois held in *City of Rockford* vs. *Grayned,* 46 Ill.2d 486 (1970), that an ordinance of the City of Rockford identical to the said Section 193-1(i) was constitutional and it affirmed the conviction of the Defendant in that case. An examination of the decision of the Illinois Supreme Court (attached to the Appendix of Petitioners) reveals that the Court in *Grayned* considered *only* the question of whether the ordinance violated the Equal Protection Clause and the opinion conspicuously makes no mention of any argument as to whether the Rockford ordinance violates the First Amendment right to free speech. After the *Grayned* decision was announced, counsel for *Grayned* requested a rehearing and appended the Seventh Circuit's decision in *Mosley* vs. *Police Department* to the motion for rehearing, thereby calling the Illinois Supreme Court's attention to the First Amendment issue and the decision of the Seventh Circuit on the identical ordinance. However, the Supreme Court of Illinois denied the Petition for rehearing and the *City of Rockford* vs. *Grayned* case appeal is now pending before this Court. (Docket No. 6856)

In addition, counsel for Respondent calls the Court's attention to one other development—a case now pending in the Appellate Court of Illinois, *City of Chicago* vs. *Polito, et al,* (Docket Nos. 54334-5-6) which has recently

been argued, but no decision has been announced. That case involves a *prosecution* under Section 193-1(i) of the Chicago ordinance—the same ordinance involved in the *Mosley* case, and again, the only issue before the Illinois Appellate Court is the constitutionality of Section 193-1(i). It is noteworthy that the City Corporation Counsel argued before the Illinois Appellate Court that the *Grayned* decision should control the decision in *Polito*. It is foreseeable that the *Polito* decision will be appealed to the Illinois Supreme Court, which on the basis of its decision in *Grayned*, would undoubtedly hold that Section 193-1(i) is constitutional.

II. REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

A. THE PRESENT CONFLICT IN THE LAW MUST BE SETTLED.

It is the position and suggestion of Respondent that the Petition for Writ of Certiorari should be granted so that the important constitutional right of a person to peacefully picket around a public school may be affirmed and so that the present confusion in the law of Illinois will be settled. It is for this reason that Respondent did not, at first, file a reply to Petitioners' Petition for Certiorari.

While it might appear in this case that Respondent's immediate self-interest would be served by denying the Petition for Certiorari, it is the belief of Respondent that in the long-range interest of the law and the uninhibited right of Respondent and others to exercise their constitutional right to peacefully picket that this Honorable Court should grant the Petition for Certiorari to settle the present conflict in the law.

The present state of the law is that within one city in Illinois—Chicago, a person has greater rights to exercise his right to freedom of speech, than in another city of that state—Rockford. This anomaly should not be permitted to stand. Moreover, the Supreme Court of Illinois was fully aware of the well-reasoned decision of the Seventh Circuit in *Mosley* vs. *Police Department* and it had an ample opportunity to change its opinion in *Grayned* upon the motion for a rehearing, but it apparently rejected and ignored the Seventh Circuit's decision and the arguments that the ordinance violated the First Amendment right to free speech, and instead, it affirmed the conviction of that defendant. Indeed, if and

when the case of *City of Chicago* vs. *Polito* is decided by the Illinois Supreme Court, it is likely that the state of the law after the *Polito* decision would be that within the same city—Chicago, an ordinance would be construed to be constitutional by the Federal Court and unconstitutional by the State court, assuming that the Illinois Supreme Court follows its own decision in *Grayned* which appears to be a reasonable assumption based upon its past actions. In order to prevent such a patently incongruous state of the law in an area as vital as the right to free speech, Respondent urges this Court to grant the Petition for Certiorari so that the Seventh Circuit's decision may be affirmed and *Grayned* would thereby be overruled.

B. THE DECISION OF THE SEVENTH CIRCUIT WAS CORRECT AND THE DECISION IN GRAYNED WAS PATENTLY IN ERROR.

Not only are the citizens of Illinois confronted with the situation of having different constitutional rights in different cities, but the right of citizens of all states to lawfully exercise their First Amendment freedom to express one's views by peacefully picketing a public school is of such paramount importance that it should not be left in a state of confusion.

The Seventh Circuit decision, based on the abridgement of the First Amendment, was manifestly correct. The Court simply applied the well-settled decisions of this Court in *Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *Food Employees* v. *Logan Plaza,* 391 U.S. 308 (1968); *Cameron* vs. *Johnson,* 390 U.S. 611(1968); and *Cox* vs. *Louisiana,* 379 U.S. 559 (1965) which upheld the principle that peaceful picketing carried on in a location opened generally to the public is protected by the First

Amendment. Applying that principle to the Chicago ordinance, which on its face makes no attempt to restrict its application to the manner or purpose of picketing, the Seventh Circuit properly concluded that the ordinance was overly broad as it proscribes all forms of picketing within 150 feet of a school no matter how peaceful, pristine or innocuous.

Respondent is at a total loss to understand how the Supreme Court of Illinois could simply ignore this logical, well-reasoned decision of the Seventh Circuit and the decisions and precedents of the highest Court of the land cited and relied on by the Seventh Circuit.

Moreover, the decision of the Supreme Court of Illinois in *Grayned,* holding that the ordinance did not violate the Equal Protection Clause was equally shocking. This decision is plainly erroneous and should be overruled by affirming the *Mosley* decision. By upholding the Rockford ordinance (identical to the Chicago one) the Court sanctioned "labor picketing" around schools, but no other types. This is the most invidious form of discrimination in violation of the Equal Protection Clause as there clearly can be no rational basis for such a distinction. If peace and tranquillity of the school and the safety of students are at all part of the purpose of this ordinance, it hardly is a reasonable classification to permit hundreds of labor pickets to march around a school from morning until night picketing for higher wages, while one silent marcher picketing for civil rights, or that certain textbooks should be read, is prohibited from doing so.

In *Cox* v. *Louisiana,* 379 U.S. 536 (1965), Justice Black in a concurring opinion addressed himself di-

rectly to the issue presented by the decision of the Supreme Court of Illinois in *Grayned*. He stated:

> ". . . by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an *invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment.*" (581, emphasis supplied)

CONCLUSION

For the reasons set forth above, Respondent urges that the Writ of Certiorari be issued so that the judgment and opinion of the Seventh Circuit may be reviewed and affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-87

POLICE DEPARTMENT OF THE CITY OF CHICAGO; JAMES B. CONLISK, SUPERINTENDENT OF THE POLICE DEPARTMENT OF THE CITY OF CHICAGO, AND RICHARD J. DALEY, MAYOR OF THE CITY OF CHICAGO,

Petitioners.

vs.

EARL D. MOSLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE PETITIONER.

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IN THE

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OCTOBER TERM, 1971.

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POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, SUPERINTENDENT OF THE POLICE DEPARTMENT OF THE CITY OF CHICAGO, AND RICHARD J. DALEY, MAYOR OF THE CITY OF CHICAGO,

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vs.

EARL D. MOSLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals (A. 42-47) is reported at 432 F. 2d 1256 (1970).

The findings of fact and conclusions of law (A. 35-87) and the judgment order (A. 38) of the District Court are unreported.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 29, 1970 (A. 41). On January 20, 1971, by order of Mr. Justice Marshall, the time within which to file a petition for a writ of certiorari was extended to February 26, 1971 (A. 47). The petition was filed on February 25, 1971, and was granted on October 12, 1971 (A. 48). The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether Section 193-1(i) of the Municipal Code of Chicago, Illinois, by prohibiting picketing and demonstrating on a public way within 150 feet of any primary or secondary school building while the school is in session, one-half hour before the school is in session and one-half hour after the school session has been concluded, violates the guarantee of freedom of speech established by the First Amendment to the Constitution of the United States.

2. Whether the same ordinance, by reason of overbreadth or vagueness, denies due process of law in violation of the Fourteenth Amendment.

3. Whether the same ordinance, by exempting from its restrictions "the peaceful picketing of any school involved in a labor dispute," violates the equal protection of the law clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED.

I. CONSTITUTION OF THE UNITED STATES, AMENDMENT I:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

II. UNITED STATES CODE, TITLE 42:

§ 1983. Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

III. MUNICIPAL CODE OF CHICAGO, ILLINOIS, SECTION 193-1(i):

"§ 193.1 A person commits disorderly conduct when he knowingly:

"• • •

"(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute."

STATEMENT OF THE CASE.

This lawsuit was filed on October 23, 1968, under 28 U. S. C. A. § 2201 and 42 U. S. C. A. § 1983. It sought declaratory and injunctive relief against enforcement of Section 193-1(i) of the Municipal Code of Chicago. That ordinance provides:

> "§ 193-1 A person commits disorderly conduct when he knowingly:
>
> "• • •
>
> "(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute."

This provision had been enacted on March 26, 1968, by the City Council of Chicago as part of a new comprehensive disorderly conduct ordinance in modern phraseology. It had been introduced by the Mayor, at the request of the Corporation Council. (Coun. J. March 6, 1968, p. 2297.) The Committee on Judiciary had reported it favorably by a vote of 6 to 2. (Coun. J. March 20, 1968, p. 2406.) Subsequently it passed the City Council by a vote of 37 to 3. (Coun. J. March 26, 1968, pp. 2561-2.) The amendment became effective April 5, 1968. Subsection (i), the measure before this Court, was included in response to the widespread disorders and considerable violence that had been occurring at that time in, near and around public grammar schools and high schools (as well as colleges and universities), and which are matters of common knowledge.

Respondent Mosley alleged in his civil rights complaint that this ordinance abridged his rights of freedom of speech, equal protection of the laws and due process guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Since early September, 1967, and until April 4, 1968, Mosley had been picketing on a public way adjoining Jones Commercial High School in Chicago (A. 4, 18). He had been in the habit of appearing there after his working hours as a postal employee and of pacing back and forth carrying "a big picket sign" that said:

> "Jones High School practices black discrimination. Jones High School has a black quota." (A. 21.)

Mosley's objective was to force the Chicago Board of Education to make Jones Commercial High School "half black" (A. 19, 20). His committee had presented that demand to the associate superintendent of schools in charge of vocational education (A. 19, 20). At the trial Mosley asserted that, according to the Board of Education "head counts," there were, "as we sit here right now" (June 6, 1969), 1006 students at Jones Commercial High School and that, of these, 742 were white, 240 black, and 20 Puerto Rican (A. 20). He further claimed that of the black students "less than 100" would graduate. There was no showing that not more than 100 out of 240 is an unduly small percentage of graduations. And on cross-examination, Mosley admitted:

> "No, I could not say that any black student has been denied enrollment at Jones Commercial High School." (A. 28.)

It is not, however, contended that Mosley's picketing was violent or actually occasioned violence.

Upon reading in a newspaper of the enactment of the ordinance here in question, Mosley inquired, so he testi-

fied, of an unnamed representative of the Human Relations Section of the Chicago Police Department (A. 5, 22), an unnamed desk sergeant at the nearest station house (A. 5, 24) and, through one of his lawyers, of an unnamed attorney in the city law department (A. 5), as to the applicability of the ordinance to his picketing activities. He said he was informed that he would have to observe the limitations required by the ordinance and that, if he did not, he would be arrested.

Thereupon, Mosley stopped picketing and instituted this action for declaratory and injunctive relief in the United States District Court for the Northern District of Illinois on October 23, 1968 (A. 3).

At the trial in the District Court on June 6, 1969 (A. 12), at the close of plaintiff Mosley's case, the trial judge, passing over the City's contention that the plaintiff had failed to prove irreparable damage (A. 33), granted the City's motion for a directed verdict on the merits (A. 34). The District Court, in its findings of fact and conclusions of law (A. 35-37), ruled that this was a proper proceeding for a declaratory judgment and that Mosley had standing to bring it (A. 36). But as to the merits of the controversy, the District Court held:

> "Section 193-1 of the Municipal Code of the City of Chicago does not violate Amendment I of the Constitution of the United States of America since it is a reasonable regulation as to time, place and manner. Rights of free speech and assembly, while fundamental in our democratic society, do not mean that everyone with opinions or beliefs to express may address a group at any public place at any time." (A. 36).

The District Court also found that the ordinance is not unconstitutionally vague and that the exemption of labor unions is a reasonable classification and does not violate the Fourteenth Amendment. A judgment order dismissing

the action was entered by the District Court on August 19, 1969 (A. 36, 37).

Mosley filed notice of appeal on September 17, 1969 (A. 39).

In reversing this judgment, the Court of Appeals for the Seventh Circuit came to the conclusion that:

> "We think it clear that the ordinance is overbroad. It lays down a blanket prohibition against all forms of picketing or demonstrating (other than labor picketing) within 150 feet of a school no matter how peaceful, pristine or innocuous. It prohibits one man carrying a sign from walking on a public sidewalk adjoining a school, without condition or reservation." (A. 44.)

In arriving at this result, the Court of Appeals may have been influenced by a misunderstanding of the City's position. The opinion states (A. 43) that "Defendants admit that at all times plaintiff's actions were peaceful and orderly, that he never interrupted the free flow of traffic to and from the school and that they had no reason to believe his activities would lead to acts which were not peaceful, orderly and quiet." Actually, these "admissions" were the City's failure to deny Mosley's requests for admissions (A. 10, 11, 31, 32).

The City questions whether it was proper for the Court of Appeals to permit such a technicality to nullify common knowledge that, in the year 1968 and also at the present time, in the city of Chicago, as well as in many other cities in the United States, activities such as Mosley's in picketing for a racial quota in front of a public school might reasonably be expected to lead to acts that would not be peaceful, orderly and quiet.

The Court of Appeals deemed it unnecessary to examine Mosley's other constitutional contentions (A. 47)—*i.e.*, that the ordinance denies due process, because of vagueness, and

violates the equal protection clause, because it exempts labor picketing.

In petitioning this Court for certiorari, the City of Chicago noted that the Illinois Supreme Court in *City of Rockford* v. *Grayned,* 46 Ill. 2d 486 (1970), on September 29, 1970, had come to a result in direct conflict with the decision of the Seventh Circuit in the instant case. In *Grayned,* an ordinance violation prosecution, the Illinois Supreme Court upheld the validity of an ordinance of Rockford, Illinois, that is word for word the same as the Chicago ordinance in the case at bar. In consequence, there is a direct conflict between a decision of a Court of Appeals and a decision of the highest state court, in a state within the same circuit, as to the validity, under the federal constitution, of identical municipal ordinances.

Furthermore, as Mosley has noted in his brief in response to the petition of the City of Chicago for a writ of certiorari (pp. 4, 5), there is now pending and under advisement in the Illinois Appellate Court, First District in *City of Chicago* v. *Polito,* Nos. 54334-5-6, an appeal from three convictions under the same Chicago ordinance which is the subject of the instant proceeding. The *Polito* cases arose out of demonstrations against busing of school children to effectuate school desegregation.

This Court granted certiorari in the instant case on October 12, 1971, and ordered that it be consolidated with the appeal in *City of Rockford* v. *Grayned,* No. 70-5106, in which on the same day probable jurisdiction had been noted.

SUMMARY OF ARGUMENT.

I.

In 1968 the City of Chicago enacted an ordinance prohibiting picketing and demonstrating on a public way within 150 feet of any primary or secondary school while the school is in session and one-half hour before and one-half hour after school sessions. This ordinance was made law in response to widespread disorders at schools, which are matters of common knowledge.

Picketing and demonstrating are more than speech, as this Court has declared on numerous occasions. Picketing and demonstrations produce, and are intended by their participants to produce, different and more potent effects than mere speech. The picket line elicits powerful conditioned responses, both favorable and unfavorable. Demonstrations are mass psychology situations educing hypersuggestibility.

Therefore, the regulation of the time and place of picketing is permitted under the Constitution so long as the regulation is reasonably related to a legitimate state interest.

Public education is an indubitable state interest. In consequence, the States, their local government agencies and their school officials have comprehensive authority to control conduct in the schools and resolve conflicts arising in the operation of the schools. The constitutional rights of students and teachers to freedom of speech and thought must be safeguarded, however, so long as they do not interfere with the educational process.

The Chicago ordinance now before this Court is narrowly

limited to school hours and the half-hours immediately before and after school sessions. The ordinance is precisely restricted to the short distance of 150 feet from a school. From the very terms of the ordinance, it is obvious that its purpose is to prevent distractions from and disruptions of the educational process.

Therefore, the ordinance is not overbroad. A municipality has as much constitutional right to enact such an ordinance as to create zones of quiet around hospitals.

II.

The Chicago ordinance exempts labor picketing from its scope. However, the issue of whether this exemption violates the equal protection clause of the Fourteenth Amendment was not passed upon by the Court of Appeals. Therefore, the issue may not properly be before this Court.

Assuming *arguendo* that the issue is before this Court, it is abundantly clear that the exemption of labor picketing is a reasonable classification and, therefore, not invidious discrimination violative of the Fourteenth Amendment.

There are obvious differences between labor picketing and civil rights demonstrations. After more than 30 years of the regulation of labor relations by the National Labor Relations Board, violence and disorders have been for the most part eliminated from labor picketing, which nowadays is usually token, symbolic picketing. Student demonstrations, parents' demonstrations and civil rights demonstrations often result in mass picketing, sit-ins, violence. These palpable differences justify the exemption of labor picketing from the ordinance before the Court.

Another reason for the exemption is avoidance of conflict with pre-emptive federal regulation of labor disputes.

In the event the Court deems the exemption of labor picketing impermissible, we urge the Court not to invalidate the whole ordinance, but only the exemption.

ARGUMENT.

I.

THE ORDINANCE DOES NOT VIOLATE THE FIRST AMENDMENT.

The Court of Appeals has held the Chicago ordinance "overbroad." (A. 44.) Although that court did recognize that "picketing . . . contains elements other than pure speech" and may be the subject of reasonable regulation, citing *Hughes* v. *Superior Court*, 339 U. S. 460, 464 (1950), the Court of Appeals in effect agreed with Mosley that so long as picketing is nonviolent and is not carried on for an illegal purpose, the time and place of the picketing cannot be regulated.

It was and is the position of the City of Chicago that regulation of the time and place of picketing is constitutional if the regulation is reasonably related to a legitimate state interest. In this regard, the City relies particularly on *Cox* v. *Louisiana*, 379 U. S. 536 (1965), and the oft quoted language therein (at 554):

> "The constitutional guaranty of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of

social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly."

Public education is an indubitable state interest. The Constitution of the State of Illinois impresses upon the State the duty to provide "an efficient system of high quality public educational institutions and services." *Constitution of the State of Illinois* (1970), Art. X, Sect. 1; see also *Constitution of the State of Illinois* (1870), Art. VIII, Sect. 1; *Board of Education* v. *Redding*, 32 Ill. 2d 567, 207 N. E. 2d 427 (1965).

This Court, in the very cases in which it has acted to protect the First Amendment rights of teachers and students, has reiterated its repeated emphasis upon "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503, at 507 (1969). "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson* v. *Arkansas*, 393 U. S. 97, at 104 (1968). The instant ordinance is in aid of the local school authority's control of the educational process.

The public schools are thus established by the State and are under the control of the State and its municipalities and local agencies. The ordinance here in question was, by its very terms, clearly enacted to prevent distraction of public school students from the instruction which the State is under the duty to provide. In *Waugh* v. *Board of*

Trustees of the University of Mississippi, 237 U. S. 589, at 596, 597 (1915), the Court said that it is not for the federal courts to entertain conjectures in opposition to the views of the State and its agencies and annul an ordinance upon disputable considerations of its wisdom or necessity.

The opinion of the Court of Appeals here admits (A. 45):

> There can be no doubt that picketing, since its contains elements other than pure speech, may be the subject of reasonable regulation. *Hughes* v. *Superior Court*, 339 U. S. 460, at 464 (1950)."

The Court of Appeals recognized that this Court, in *Cox* v. *Louisiana*, 379 U. S. 559 (1965), upheld a statute prohibiting picketing near a courthouse with the intent to obstruct justice, for the reason that the statute "was precise and was narrowly drawn to protect a valid state interest."

In the very act of finding the instant Chicago ordinance "overbroad", the Court of Appeals also admitted (A. 45, 46) that:

> "Obviously, the City of Chicago could enact an ordinance to prevent the disruption of the educational process that would not violate plaintiff's right of free speech."

The City of Chicago, we submit, has done just that in enacting the instant ordinance, which is narrowly limited to school hours and the half-hours immediately before and after school sessions. The ordinance is precisely restricted to the short distance of 150 feet from a school. From the very terms of the ordinance it is obvious that its purpose is to prevent distractions from and disruptions of the educational process.

It is no more improper for the City to create such buffer zones around schools than it is for the City to create

the traditional zones of quiet around hospitals. In fact, the Municipal Code of Chicago employs quite similar language in creating hospital zones of quiet. Section 36-1 thereof provides:

> "There is hereby created and established a zone of quiet in all territory within the block upon which abuts the premises of any hospital owned, controlled or operated by the federal, state, county or city governments or any licensed hospital or home."

The present ordinance is appropriate to the felt needs of the situation. The ordinance does not seek to repress peaceful protests and demonstrations even immediately adjacent to public schools, if they are outside school hours. It merely constitutes an effort to keep such expressions of First Amendment freedoms in reasonable channels so that they will not disrupt the quiet processes of acquiring knowledge and vocational skills. It essays to do this by merely keeping demonstrations at least 150 feet from school premises during school hours and for a half-hour before and after school hours—the times when children are arriving at and leaving school.

150 feet is no great distance. It does not prevent the students from knowing that a demonstration is going on. If students are interested, they can at suitable times examine into the demonstration more closely and participate, if they so desire. But the distance of 150 feet does tend to assure that the primary interest of students generally—acquiring an education and preparing for adult life—will be protected from distraction and interference.

The 150 foot buffer zone also aids the police in forestalling violence, since those bent on violence will make even shorter shrift of the distance limitation. Violation of the boundary serves to alert the police against the possibility of more serious transgressions.

This Court, in *Cox* v. *Louisiana*, 379 U. S. 559, at 568 (1965), cited, with apparent approval, as examples of sufficiently precise specifications of nearness, a District of Columbia statute (52 Stat. 30 (1938), DC Code, 1961, § 22-1115), prohibiting certain acts within 500 feet of foreign embassies, legations and consulates, and a New York statute (McKinney's N. Y. Laws, Penal Law § 600), prohibiting certain activities within 200 feet of a courthouse.

Nor does the ordinance prohibit speech within 150 feet of a school during school hours, except the non-pure form of speech that is picketing and demonstrating. And it prohibits them only within narrow limits.

"A state is not required to tolerate in all places . . . even peaceful picketing by an individual." *Bakery and Pastry Drivers Local* v. *Wohl*, 315 U. S. 769, at 775 (1942). As already noted, picketing is speech, plus other elements, and in its opinion the Court of Appeals acknowledged this fact (A. 45). This Court made it very clear in *Hughes* v. *Superior Court of California*, 339 U. S. 460, at 464, 465 (1950), that:

> "[W]hile picketing is a mode of communication it is inseparably something more and different . . . [t]he very purpose of a picket line is to exert influences, and it produces consequences different from other modes of communication. The loyalties and responses evoked and enacted by picket lines are unlike those flowing from appeals by printed word."

The picket line elicits powerful conditioned responses, both favorable and unfavorable. Demonstrations are mass psychology situations educing hypersuggestibility. Bystanders at demonstrations frequently find themselves caught up in an unexpected, spontaneous, unthinking loss of their inhibitions.

The Court of Appeals relied (A. 44, 45) upon *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), as authority for its view that, under the First Amendment, picketing, so long as it is peaceful and not carried on for an illegal purpose, cannot be regulated as to time and place. That reliance, we submit, is simplistic and misplaced. As is well known, *Thornhill* has long since been qualified with numerous exceptions by a long line of decisions of this Court. *Thornhill* invalidated an Alabama statute that made all labor picketing illegal. The language in *Thornhill* was appropriate to that broad purpose. But implementation of the policy of protecting picketing as a form of communication inevitably encountered the myriad thorny problems of manner and purpose, time and place. The late Mr. Justice Frankfurter has chronicled this development in *Teamsters' Union, Local 595* v. *Vogt, Inc.*, 354 U. S. 284 (1957). See also Gregory, *Labor and the Law* (2d rev. ed. 1958), ch. XI, The Rise and Decline of the Thornhill Doctrine; Tanenhaus, *Picketing—Free Speech: The Growth of the New Law of Picketing from 1940 to 1952*, 38 Cornell L. Q. 1 (1952).

The long line of cases limiting the broad language of *Thornhill* v. *Alabama*, 310 U. S. 88 (1940) includes *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287 (1941), *Carpenter's Union* v. *Ritter's Cafe*, 315 U. S. 722 (1942), *Bakery and Pastry Drivers Local* v. *Wohl*, 315 U. S. 769 (1942), *Giboney* v. *Empire Storage Co.*, 336 U. S. 490 (1949), *Hughes* v. *Superior Court*, 339 U. S. 460 (1950), *Edwards* v. *South Carolina*, 372 U. S. 229 (1963), and *Cameron* v. *Johnson*, 390 U. S. 611 (1968).

In *Carpenter and Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722 (1942), the union petitioners, like Mosley here, claimed (at 725) that the Fourteenth Amendment constituted a constitutional command that peaceful picketing

must be wholly immune from regulation. A restaurant, which was unionized and where there was no labor dispute, was peacefully picketed by the petitioners, building trades unions, because the owner of the restaurant also owned a building under construction by a contractor who employed non-union labor. Nevertheless, this Court upheld a Texas injunction, prohibiting the picketing, with the declaration that (at 727, 728):

> "[R]ecognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. . . .
>
> "To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma. . . . We must be mindful that 'the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist.' . . . *Thornhill* v. *Alabama*, 310 U. S. 88, 103, 104."

In like manner, Mosley here contends that peaceful civil rights picketing must be wholly immune from regulation. But here, likewise, recognition of such picketing as an exercise of free speech does not deprive the state and its local governmental units of the power to place limits on the sphere of such communication in the educational interests of the society in which Mosley exists.

Milk Wagon Drivers Union v. *Meadowmoor Dairies*, 312 U. S. 287 (1941), held that the issuance of an injunction restraining peaceful picketing did not constitute an infringement of the right of free speech where previous acts of violence by members of the union or their sympathizers gave to the picketing, even though peacefully carried on, a coercive effect. The admittedly peaceful picketing had occurred against a background of extensive violence— win-

dow-smashing, bomb explosions, stench bombs, arson, beatings (at 291, 292). But, as a dissenting opinion noted (at 314, 315), the violence, which occurred during a farmers' strike, had taken place eight months before any picketing by the milk wagon drivers' union, and it was not until four years later that the trial judge granted an injunction. "All of the violence," Justice Black observed, "took place many months before any of the picketing occurred" (at 314, 315). Yet this Court in the *Meadowmoor* case found that the Illinois Supreme Court could reasonably conclude that the peaceful picketing was coercive. Justice Frankfurter, writing for the Court, said (at 294):

> "[A]cts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set against a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful."

This Court declared that in this situation a state is not limited to prosecuting acts of violence after they occur. On the contrary, a state may take preventive measures. In the words of Justice Frankfurter (at 295):

> "[T]he Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club."

Likewise, the Fourteenth Amendment does not prevent a state or any of its local governmental units from enacting, against a background of extensive student disorders and violence, a statute or ordinance designed to prevent picketing, otherwise peaceful, in a narrowly defined area where it can reasonably be concluded that, because of the background

of disorder and violence, picketing, though peaceful, will have a coercive effect.

International Brotherhood of Teamsters, Local 695 v. *Vogt, Inc.*, 354 U. S. 284 (1957), affirmed a Wisconsin injunction against picketing the premises of an employer to induce some of its employees to join the union. The ground of the decision was that the picketing was for a purpose unlawful under state law, namely, for the purpose of coercing an employer to interfere with its employees in the exercise of their right to join or not to join a union.

The majority opinion in *Vogt* was written by Justice Frankfurter, who improved upon the occasion with a review of the history of the cases of this Court on "the limits imposed by the Fourteenth Amendment on the power of a State to enjoin picketing" (at 285). He remarked (at 287):

> "It is inherent in the concept embodied in the Due Process Clause that its scope be determined by a 'gradual process of judicial inclusion and exclusion.' *Davidson* v. *New Orleans*, 96 U. S. 97. Inevitably, therefore, the doctrine of a particular case 'is not allowed to end with its enunciation and . . . an expression in an opinion yields later to the impact of facts unforeseen.' *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, 619 (Brandeis, *J.*, dissenting). It is not too surprising that the response of States—legislative and judicial—to use of the injunction in labor controversies should have given rise to a series of adjudications in this Court relating to the limitations on state action contained in the provisions of the Due Process Clause of the Fourteenth Amendment. It is also not too surprising that examination of these adjudications should disclose an evolving, not a static, course of decision."

In the course of his summary of the leading cases in this area, Justice Frankfurter remarked (at 290):

> "Although the Court in *Ritter's Cafe* and *Wohl* did not question the holding of *Thornhill*, the strong reliance on the particular facts in each case demon-

> strated a growing awareness that these cases involved not so much questions of free speech as review of the balance struck by a State between picketing that involved more than 'publicity' and competing interests of state policy."

The dissenting opinion of Mr. Justice Douglas in *Vogt* (at 295-297) characterized the line of cases summarized in *Vogt* and *Vogt* itself as a complete retreat from *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), and *A. F. of L.* v. *Swing*, 312 U. S. 321 (1941). The net result, he said (at 297), was:

> "[F]or practical purposes, the situation now is as it was when *Senn* v. *Tile Layers Union*, 301 U. S. 468, was decided. State courts and state legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing."

According to Justice Frankfurter's historical summary in *Vogt*, 354 U. S. 284, at 291 (1957), "[t]he decisive reconsideration" of "the broad language of the *Thornhill* case" "came in *Giboney* v. *Empire Storage and Ice Co.*, 336 U. S. 490" (1949). In *Giboney* an ice peddlers' union was picketing a wholesale distributor of ice who was selling ice to non-union ice peddlers. The objective of the picketing, which was peaceful, was to obtain better pay and working conditions for ice peddlers by inducing all wholesale ice distributors in Kansas City to agree not to sell ice to non-union peddlers. Only Empire Storage refused to agree. It obtained an injunction against the peaceful picketing, on the ground that the objective of the picketing was illegal under a Missouri criminal statute prohibiting combinations in restraint of trade. The Missouri Supreme Court affirmance of the injunction was unanimously affirmed by this Court.

In *Giboney* the union asserted that its right to picket was guaranteed by the First and Fourteenth Amendments because a labor dispute did exist and its picketing was truthful

and peaceful. This Court unanimously rejected that contention, stating (at 497), "The Constitution has not so greatly impaired the states' or nation's power to govern." It held that the states and the nation have the power to enact laws prohibiting combinations in restraint of trade and that they have the further power to exempt or not exempt, as they choose, labor unions from such laws. Missouri did not so exempt labor unions; therefore, the peaceful picketing of the union in *Giboney* was illegal. This Court expressly repudiated the proposition that peaceful picketing is beyond legislation (at 500). On the contrary, in the words of the Court in *Wohl,* 315 U. S. 769, at 775 (1942):

> "A state is not required to tolerate in all places . . . even peaceful picketing by an individual."

More recently, in *Cameron* v. *Johnson,* 390 U. S. 611 (1968), this Court upheld the validity of a Mississippi statute prohibiting picketing, singly or in concert with others, and mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises, state property, county or municipal courthouses, city halls, office buildings, jails or other public buildings or property, or with the transaction of public business or the administration of justice therein or so as to obstruct or unreasonably interfere with free use of public streets, sidewalks or ways. The opinion of this Court contains the comment (at 619):

> "Any chilling effect on the picketing as a form of protest and expression that flows from good faith enforcement of this valid statute would not, of course, constitute that enforcement an impermissible invasion of protected freedoms. *Cox* v. *Louisiana,* 379 U. S. 559, at 564."

But it was in *Edwards* v. *South Carolina,* 372 U. S. 229 (1963), that this Court expressly indicated that an enactment such as the instant ordinance is constitutional. In

Edwards several hundred Negroes had demonstrated on the state house grounds in generalized protest against discrimination. A crowd of whites, presumably hostile, gathered and watched the demonstration. But police presence was ample. There was no violence. The demonstrators were arrested and convicted of breach of the peace. Affirmance by the South Carolina Supreme Court was reversed by this Court. In the course of holding that the convictions infringed the demonstrators' rights of free speech, freedom of assembly and freedom to petition for the redress of grievances, this Court stated (at 236):

> "We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, *the petitioners had been convicted upon evidence that they had* violated a law regulating traffic, or had *disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case.*" (Emphasis supplied.)

State House grounds are as public as a street or sidewalk. If the state can limit access to State House grounds to certain specified periods, and thus limit picketing and demonstrating on State House grounds to certain periods of the day, then the state, in furtherance of its interest in public education, can equally limit access to certain streets and sidewalks to certain periods and can, more narrowly, limit in particular certain kinds of access—access for the purpose of picketing and demonstrating—to certain streets and sidewalks (those within 150 feet of a public school) at certain hours of the day (during and immediately before and after school hours).

In *United States* v. *O'Brien*, 391 U. S. 367, at 376 (1968), this Court noted that it has held that:

> "[W]hen 'speech and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

The Court then went on to explain (at 376, 377) that, whatever the imprecision inhering in such terms as "compelling", "substantial", "paramount" and so forth, it is clear that a governmental regulation is sufficiently justified—

1) if it is within the constitutional power of the Government;

2) if it furthers a substantial governmental interest;

3) if the governmental interest is unrelated to the suppression of free expression; and

4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Applying this test to the Chicago ordinance now before this Court, it is clear the incidental limitations on First Amendment freedoms therein are justified by a sufficiently important governmental interest, in that:

1) it is within the state power and duty to provide a system of public education and protect it from disturbance;

2) its ban on disruptive and distracting conduct around public schools during school hours and during the half-hour periods immediately before and after school hours when the pupils are going to and coming from school furthers the state's interest in public education;

3) the governmental interest in providing public education in an appropriate atmosphere conducive to the learning process is unrelated to the suppression of free expression; and

4) the possible limited restriction on First Amendment freedoms involved is no greater than is essential to the state's interest in public education.

It is a distortion of the facts to dwell upon the fortuitous circumstance that the particular individual who filed this test action for declaratory judgment apparently conducted himself peaceably, and to ignore the background of widespread violent demonstrations, in Chicago and throughout the nation, much of it engaged in by the students themselves, in response to which this legislation was enacted.

The opinion of the Court of Appeals adverts to what it calls the City's admission that not only were Mosley's actions peaceful and orderly, but the City had no reason to believe his activities would lead to acts which were not peaceful, orderly and quiet (A. 43, 46). This admission was no more than technical and *pro forma*, the result of the City's failure to deny Mosley's requests for admissions (A. 10, 11, 31, 32). Though this may be binding as between Mosley and the City, it did not justify the Court of Appeals, in weighing the reasonableness of the ordinance, to fail to take judicial notice of the extremely unsettled state of affairs in the public schools of Chicago as well as of many other cities in all parts of the nation—a matter of common knowledge.

The Chicago ordinance was narrowly drafted to effectuate weighty and urgent public purposes. Persons sincerely interested in education should find nothing unreasonable in the modest restrictions of this precautionary measure. It should be upheld.

II.

THE EXEMPTION OF LABOR PICKETING FROM THE ORDINANCE IS NOT INVIDIOUS DISCRIMINATION AND DOES NOT VIOLATE THE FOURTEENTH AMENDMENT.

The Court of Appeals, in reversing the District Court in *Mosley*, deemed it unnecessary to examine the issue of whether the Chicago ordinance violated the equal protection clause of the Fourteenth Amendment (A. 47). Therefore it is doubtful if the issue is properly before this Court.

In his complaint filed in the District Court Mosley alleged in a general way that the "ordinance denies him equal protection of the law in violation of the First and Fourteenth Amendments" (A. 6). At the trial his attorney asserted that "the proviso regarding the labor dispute . . . constitutes a violation of the equal protection clause" (A. 14). The District Court found that "the exemption of labor unions is a reasonable classification and the City has no right to regulate labor disputes as they are governed by Federal labor laws" (A. 36, 37).

But the Court of Appeals stated in its opinion (A. 47) that having determined that the ordinance is unconstitutional on its face because of overbreadth (A. 44), "we do not deem it necessary to examine plaintiff's other constitutional contentions" (A. 47).

The reason for the inclusion of the labor exemption proviso in the ordinance was the belief of the City Council of Chicago, and its legal advisers in enacting the ordinance, that such exemption was necessitated by federal pre-emption of the regulation of labor relations under the Labor-Management Relations Act. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, at 383, 390, 391 (1969). This was also the defense

of the labor picketing exemption made in the City's argument at the trial (A. 15, 16). The District Court agreed with that position and adopted it in its Findings of Fact and Conclusions of Law (A. 36, 37). As we have said, the Court of Appeals did not rule upon it.

The argument based on federal pre-emption has some merit. Despite the exemption in Section 152 of the National Relations Act (29 U. S. C. A. § 152) of states and their political subdivisions from the definition of "employer," there are many aspects of concerted activities by public employees which do fall within the exclusive federal jurisdiction. Observance of and respect for the picket lines of public employees by union employees of private employers can have repercussions in the federal sphere. Rather than become involved in this quagmire of thorny questions of law and labor relations, the City Council exempted labor picketing from the ordinance.

Apart from the question of federal pre-emption, the City Council was on solid ground in subjecting labor picketing and general protest picketing to different rules. The equal protection clause of the Fourteenth Amendment does not deprive the States of the power to make reasonable classifications in legislation enacted under their police powers.

For a state legislative classification to be violative of the equal protection clause, the classification must amount to an invidious discrimination. There is no violation of equal protection where the legislative distinction reflects the fact or the reasonable legislative belief, that evils in the same field are of different dimensions and proportions, requiring different remedies. Nor is there a violation of equal protection where the discrimination occurs as a consequence of reformative legislation which takes one step at a time and addresses itself to the phase of the problem which seems most acute to the legislative mind.

In *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483 (1955), the Court stated the matter thus (at 489):

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner* v. *Texas*, 310 U. S. 141. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler* v. *Dental Examiners*, 294 U. S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others, *A. F. of L.* v. *American Sash Co.*, 335 U. S. 538. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

The Fourteenth Amendment thus permits the states a wide scope of discretion in enacting laws that affect some groups differently than others. The constitutional safeguard is transgressed only if the classification rests on grounds wholly irrelevant to the state objective. Since state legislative bodies are presumed to have acted within their constitutional power, a statutory classification determination is not invalid if any available state of facts justifies it. *McGowan* v. *Maryland*, 366 U. S. 420, at 426 (1961).

Apart from the question of federal pre-emption, the City Council of Chicago, in endeavoring to safeguard peaceful conditions for public education, was on solid ground in laying down slightly different rules for labor picketing and general protest.

Although the civil rights movement has understandably endeavored to press into its service the constitutional precedents developed in labor relations litigation, there are important differences between labor picketing and picketing by civil rights groups. See Kamin, *Residential*

Picketing and the First Amendment, 61 Nw. U. L. Rev. 177, at 208, 209 (1966).

The Chicago school picketing ordinance was enacted in 1968. It envisaged labor picketing as of that date and this is now as it was then. By 1968 labor picketing had evolved, largely as the result of the administrative activity of the National Labor Relations Board over a period of more than 30 years, into something totally different from labor tactics (and management tactics) in Debs' Pullman strike, the bloody steel strikes of the late 19th century and the bloody coal mine strikes of the early 20th century. The sit-down strikes of the 1930's are no longer a feature of labor disputes, nor is the mass picketing of the years immediately after World War II.

Labor picketing is now usually token picketing. Its purpose is to communicate the information that a labor dispute is in progress at the establishment concerned and to enlist the cooperation of other members of organized labor and their sympathizers in not working there, in not delivering supplies, etc. It seldom leads to disruption of the public peace, hardly ever to window smashing, arson. Labor picketing can be carried on without interrupting classes or even distracting the students. A labor dispute at a school may, it is true, result in a shortage of teachers, but this has nothing to do with the distance of labor pickets from the schoolhouse door. Furthermore, under Illinois law a strike by employees of a public school is illegal and enjoinable and may be dealt with accordingly. *Board of Education* v. *Redding,* 32 Ill. 2d 567, at 571, 572 (1965).

As we all know, student demonstrations at schools—and even such demonstrations by parents and "concerned citizens"—are utterly different. Mass picketing, sit-ins, smashed windows have been the order of the day. The very

purpose of such demonstrations often is to bring the educational process to a halt. In 1969 there were some 6000 such incidents—ranging from political protests through racial strife to arson attempts—in the nation's public high schools. NEWSWEEK, Feb. 16, 1970, p. 65.

These palpable differences between protest demonstrations and labor picketing justify the exemption of labor picketing from the ordinance. The Illinois Supreme Court was correct in upholding such an exemption in *City of Rockford* v. *Grayned*, 46 Ill. 2d-486 (1970).

However, in the event the Court deems the exemption of labor picketing impermissible, we urge the Court not to invalidate the whole ordinance, but only the exemption.

Unconstitutional exceptions may be stricken out of an enactment without invalidating the whole, when to do so does not defeat the general legislative intent. "Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which it was intended to qualify or restrain." *Davis* v. *Wallace*, 257 U. S. 478, at 484 (1922).

Here, to eliminate the labor picketing exception, but allow the broad ban on picketing and demonstrating immediately adjacent to schools during school hours to stand would not defeat the general intent of the City Council, which is to prevent disturbance of the educational process.

CONCLUSION.

The judgment of the Court of Appeals should be reversed and the Chicago ordinance declared valid.

Respectfully submitted,

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November 19, 1971.

FILE COPY

No. 70-87

Supreme Court
FILED
DEC 23
E. ROBERT SEAVER

In the

Supreme Court of the United States

OCTOBER TERM, 1971

POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, SUPERINTENDENT OF THE POLICE DEPARTMENT OF THE CITY OF CHICAGO, and RICHARD J. DALEY, MAYOR OF THE CITY OF CHICAGO,

Petitioners,

vs.

EARL D. MOSLEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR THE RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-87

POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, SUPERINTENDENT OF THE POLICE DEPARTMENT OF THE CITY OF CHICAGO, and RICHARD J. DALEY, MAYOR OF THE CITY OF CHICAGO,

Petitioners,

vs.

EARL D. MOSLEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR THE RESPONDENT.

SUMMARY OF ARGUMENT

The City of Chicago ordinance on its face violates the First Amendment right to freedom of speech because of its over-breadth. Peaceful picketing is protected free speech and only the manner or purpose of picketing may be regulated when required by an overriding state interest. The ordinance is not directed at the manner or purpose of picketing, but rather, it lays down a blanket prohibition against

all picketing (other than labor picketing) within 150 feet of a school, no matter how peaceful, orderly or innocuous, such as the conduct of Respondent. The ordinance thus unconstitutionally sweeps within its broad proscription all forms of picketing, those that are lawful exercises of free speech and those that may be regulated by the state, such as violent or disruptive picketing.

The ordinance violates the Equal Protection clause of the Fourteenth Amendment by creating an invidious arbitrary classification that excludes peaceful picketing involving a labor dispute from its scope. This classification between labor dispute picketers and all others bears no reasonable relationship to the stated goal of the ordinance—to preserve tranquility around schools, as it prevents the admittedly peaceful picketing of Respondent adjoining the school, but permits dozens of teamsters, school teachers or janitors to encircle a school from morning until night. This classification is even more invidious because of its effect upon preferred First Amendment rights of freedom of speech. By this ordinance, the City of Chicago is attempting to pick and choose what views may peacefully be expressed on the public way adjacent to a school in clear violation of the First and Fourteenth Amendments.

STATEMENT OF THE CASE

Respondent sets forth the salient facts to correct certain erroneous portions of Petitioners' Statement of the Case. Petitioners are the Police Department of the City of Chicago, James B. Conlisk, Superintendent of Police, and Richard J. Daley, Mayor of the City of Chicago.

In early September 1967, Respondent, Earl D. Mosley, began peacefully to walk on the public sidewalks adjoining

Jones Commercial High School in Chicago, Illinois carrying a sign which stated that Jones Commercial High School discriminated against blacks. (A. 18, 21) On March 26, 1968, the City of Chicago added a new section to its existing ordinances that turned the peaceful picketing of Respondent into a crime: disorderly conduct.[1] (A. 4, 8) The amendment reads as follows:

> 193-1 A person commits disorderly conduct when he knowingly: * * *
>
> (i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school has been concluded, provided, however, that this sub-section does not prohibit the peaceful picketing of any school involved in a labor dispute.

Respondent testified he was concerned about the quality of education for blacks, and he believed that Jones Commercial High School was discriminating against black students in its admission policies and in the treatment that it afforded them.[2] (A. 17-21) After repeated discussions with school officials with respect to discrimination at Jones proved unsuccessful, Respondent turned to peacefully pick-

---

[1] At the trial, there was no evidence whatsoever as to why the ordinance was enacted, and nothing on its face is indicative of the legislative intent. The statements throughout Petitioners' brief, and particularly on pages 5 and 8 of the Statement of the Case, that it was enacted as a result of widespread violence and disorders around schools are totally unsupported by the record.

[2] Whether Respondent's opinions were well-founded in fact is not and has never been an issue or relevant in this case, and the comments and insinuations to the contrary on page 6 of Petitioners' brief are clearly inappropriate.

eting the school, generally in the afternoon, either by himself or with a few other persons. (A. 17, 18)

Petitioners admitted that at all times Respondent's activities were peaceful and orderly and his picketing never interrupted the free flow of traffic to and from the school. (A. 11, 31-2) They admitted that Respondent had never caused a disturbance at the school, and they had no reason to believe that his activities would lead to acts which were not peaceful, orderly and quiet.[3] (A. 11, 31-2)

---

[3] Petitioners' position that these admissions of fact are "technicalities" (p. 25 of Petitioners' brief) is absurd. Petitioners were requested to admit these facts in accordance with Rule 36 of the Federal Rules of Civil Procedure. The Report of Proceedings on this point reads as follows:

> The Court: That concludes your evidence, does it?
>
> Mr. Young [Attorney for Respondent (Plaintiff)]: Yes.
>
> The Court: You have no evidence to put in?
>
> Mr. Chambers: [Attorney for Petitioners]: The City has no evidence, your Honor. We feel that the arguments are purely legal.
>
> * * * *
>
> The Court: This is all the evidence that you have on behalf of the plaintiff in this case?
>
> Mr. Young: Yes, your Honor.
>
> The Court: As far as you are concerned, the defendant rests?
>
> Mr. Young: Your Honor, I am sorry, I did want to read into the record the request for admissions which we submitted and which are deemed admitted, if I may.
>
> * * * *
>
> The Court: All right, you may proceed to read your requests for admissions into evidence.
>
> Mr. Young: These requests were served on the City and were not responded to and are deemed admitted, your Honor. [The requests for admissions were read into the record]
>
> That is it your Honor.

After the passage of the ordinance, Respondent contacted the Chicago Police and the City's Corporation Counsel. (A. 22, 24) He was advised that he would be arrested if he continued to picket the high school. (A. 22, 24) Petitioners admitted that if Respondent continued his activities in picketing the school, he would be arrested. (A. 10, 31) Respondent sought a declaratory judgment and an injunction to prevent the enforcement of the ordinance on the grounds that it violates his right to freedom of speech under the First Amendment and constitutes a denial of his right to equal protection and due process under the Fourteenth Amendment.

After a trial, the District Court held that this was a proper proceeding for a declaratory judgment and held that the ordinance was constitutional in all respects.

Respondent appealed to the United States Court of Appeals for the Seventh Circuit. On appeal there were no disputed questions of fact; the only issue was whether the ordinance was unconstitutional on its face. On October 29, 1970, the Court of Appeals reversed the District Court and held that the ordinance violated Respondent's First Amendment right to freedom of speech because the ordinance was overly broad. The Court of Appeals did not pass on Respondent's other contentions as to why the ordinance is unconstitutional.

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[3] (cont.)

The Court: They are admitted into evidence. Are there any comments by defense counsel? [Petitioners made no comments with respect to the admissions] (A. 30-32).

At no stage during these proceedings did Petitioners ever take the position that Respondent's activity "might reasonably be expected to lead to acts which were not peaceful, orderly and quiet" as they now state on page 8 of their brief.

ARGUMENT

I.

THE ORDINANCE ON ITS FACE VIOLATES THE FIRST AMENDMENT'S GUARANTEE OF FREEDOM OF SPEECH.

The Court of Appeals for the Seventh Circuit unanimously held § 193-1(i) of the Municipal Code of the City of Chicago to be "patently unconstitutional on its face". (A. 46) The Court concluded:

> We think it clear that the ordinance is overbroad. It lays down a blanket prohibition against all forms of picketing or demonstrating (other than labor picketing) within 150 feet of a school no matter how peaceful, pristine or innocuous. It prohibits one man carrying a sign from walking on a public sidewalk adjoining a school, without condition or reservation. (A. 44)

In reaching its decision, the Court of Appeals applied the clear principles heretofore established by this Court and found no basis upon which it could uphold the ordinance.

The First Amendment guarantee of freedom of speech which is the basis of the decision below was clearly articulated by this Court in *Thornhill* v. *Alabama,* 310 U.S. 88 (1940). In *Thornhill,* the Court found an Alabama anti-picketing statute to be unconstitutional on its face because its effect was "to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff. . . ." (pp. 98-9)

While the progeny of *Thornhill,* as outlined in Petitioners' brief (pp. 17-22), have permitted the regulation of picketing under certain circumstances not present here,

the basic principle of *Thornhill* remains inviolate—peaceful picketing is beyond governmental regulation. Thus, in the recent case of *Food Employees* v. *Logan Plaza,* 391 U.S. 308, 313 (1968), this Court reiterated the principle declaring:

> We start from the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment. *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *AFL* v. *Swing,* 312 U. S. 321 (1941); *Bakery Drivers Local 802* v. *Wohl,* 315 U. S. 769 (1942); *Teamsters Local 795* v. *Newel,* 356 U. S. 341 (1958).

Other recent decisions articulating these principles are *Gregory* v. *City of Chicago,* 394 U.S. 111 (1969); *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969); *Cox* v. *Louisiana,* 379 U.S. 536 (1965) and *Edwards* v. *South Carolina,* 372 U.S. 299 (1963), all holding that peaceful expression of views by picketing, marching or demonstrating is protected by the First Amendment, and *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969), holding that wearing of black armbands on school premises by students to protest the Viet Nam war is protected by the First Amendment.

Respondent, as is clear from the record, engaged in the purest form of peaceful picketing—almost identical to the conduct of Mr. Thornhill. Respondent walked quietly, peacefully and in an orderly manner on the public sidewalk adjoining Jones Commercial High School with a sign protesting what he believed to be the discriminatory racial policies of the school. Petitioners admit that Respondent's conduct was at all times peaceful, orderly and quiet, and that he never interfered with the free flow of traffic to and from the school. Further, they concede that they were

not aware of any disturbance resulting from the conduct of Respondent and that they had no reason to believe that Respondent's picketing would lead to disorderly acts.

It is clear from the foregoing cases that the peaceful picketing of Respondent is protected free speech. The vice of the City of Chicago ordinance is that it prohibits all exercises of free speech through picketing within 150 feet of a school, those that are lawful such as Respondent's peaceful picketing, as well as those that may be legitimately regulated or curtailed by the City, such as violent or disruptive picketing. This Court, on many occasions, has declared such overbroad enactments to be unconstitutional. *Zwickler* v. *Koota,* 389 U.S. 241 (1967); *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Schneider* v. *State,* 308 U.S. 147 (1939); *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971).

In spite of the established rule that peaceful picketing is protected free speech, Petitioners persist in arguing that the flat ban on all picketing within 150 feet of a school is constitutionally permissible because picketing is considered free speech "plus". Respondent has never denied that picketing contains "something more and different" than pure free speech *Hughes* v. *Superior Court,* 339 U.S. 460 (1950), and is considered free speech "plus", so that the state may regulate the manner or purpose of picketing when a valid overriding state interest requires such regulation. Justice Frankfurter, speaking for a unanimous Court, succinctly delineated when picketing may be regulated:

> Picketing is not beyond the control of the State if the *manner* in which picketing is conducted or the *purpose* which it seeks to effectuate gives grounds for its disallowance. *Hughes* v. *Superior Court,* 339 U.S. 460, 465-6 (1950) (emphasis added).

This Court has further held that an ordinance regulating picketing must balance the competing interests of the individual's freedom of speech and the interests of the state in maintaining peace and order. *Hughes* v. *Superior Court*, 339 U.S. 460 (1950); *Thornhill* v. *Alabama*, 310 U.S. 88, 105 (1940). Narrowly drafted statutes aimed at regulating specific aspects of the manner or purpose of picketing have been approved by this Court. Thus, in *Cox* v. *Louisiana*, 379 U.S. 559 (1965), this Court upheld a statute which prohibited picketing with the intent of interfering with, obstructing or impeding the administration of justice in or near a building housing a court, stating, "Here we deal . . . with a narrowly drafted statute and *not with speech in its pristine form* but with conduct of a totally different character." (p. 566, emphasis added). Similarly, in *Cameron* v. *Johnson*, 390 U.S. 611 (1968), this Court upheld a statute that only prohibited "picketing . . . in such a *manner* as to obstruct or unreasonably interfere with free ingress or egress to and from any county . . . courthouse. . . ." (p. 612, emphasis added)

In contrast, the Chicago ordinance is all encompassing; it is not limited to either the manner or purpose of picketing which are the "pluses" of picketing that may be regulated. Faced with this fact, Petitioners have taken a broad brush approach in attempting to justify this ordinance. The heart of Petitioners' argument is that because picketing is more than free speech and because the state has an interest in schools, the City of Chicago has an absolute right to create certain boundaries around schools within which all picketing or demonstrations may be proscribed, no matter how peaceful or innocuous. Petitioners' entire argument ignores the fundamental principles cited above—peaceful picketing is protected free speech and *only* the unlawful manner or purpose of picketing may be regulated.

The City of Chicago cannot abridge, deny or fetter purely peaceful picketing as it has blatantly done by this enactment.

Significantly, Petitioners cite no authorities which support the conclusion that peaceful picketing, absent an improper manner or illegal purpose, may be proscribed, as indeed there are none.[4] Every case relied on by Petitioners is distinguishable from the case at bar because in each case cited by Petitioners, the *purpose* of the picketing was unlawful (*Carpenters Union* v. *Ritter's Cafe*, 315 U.S. 722 (1942); *Bakery and Pastry Drivers Local* v. *Wohl*, 315 U.S. 769 (1942); *Giboney* v. *Empire Storage Co.*, 336 U.S. 490 (1949)) or the *manner* of the picketing was improper (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287 (1941)).[5]

In *Teamsters Union Local 595* v. *Vogt, Inc.*, 354 U.S. 284 (1957), relied on by Petitioners and quoted extensively on pp. 20-21 of their brief, this Court upheld a state court injunction against certain labor picketing solely because of its unlawful purpose. However, Justice Frankfurter concluded the opinion by stating:

---

[4] Even the opinion of the Supreme Court of Illinois in *Rockford* v. *Grayned*, 46 Ill.2d 486 (1970) does not support Petitioners' position. That opinion did not discuss the constitutionality of the ordinance under the First Amendment as this question was apparently not argued to (except on rehearing) or considered by the Illinois Court.

[5] In *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, this Court held only that the Illinois Supreme Court could conclude that in view of the prior violence of the union that was enjoined, even peaceful picketing was coercive; thus, the manner was subject to regulation.

> Of course, the mere fact that there is "picketing" does not automatically justify its restraint without an investigation into its conduct and purposes. *State courts, no more than state legislatures, can enact blanket prohibitions against picketing.* (pp. 294-5, emphasis added)

Petitioners place particular reliance on *Cox* v. *Louisiana*, 379 U.S. 536 (1965) for the proposition that the City has a right to regulate the "time and place" of peaceful picketing. (Petitioners' brief, p. 12) There is nothing in *Cox* to support this bald conclusion, and Petitioners' reliance on *Cox* is misplaced. The portion of *Cox* cited by Petitioners related to a conviction under a statute making it a crime to "obstruct . . . any public sidewalk, street . . . or other passageway." (p. 553) The statute was held to be a violation of the right to freedom of assembly and speech because it was unconstitutionally *applied* and *enforced* by the municipal authorities. The Court did not discuss the validity of the statute *on its face* which is the sole question in the instant case. Respondent does not quarrel with the substance of the lengthy quote from the *Cox* opinion on page 12 of Petitioners' brief, but submits that this language is inapplicable to the case at bar. In the portion of the opinion relied on by Petitioners, Justice Goldberg, speaking for the majority, described how an ordinance aimed specifically at regulation of traffic could have a permissible incidental effect upon First Amendment rights. The statute held invalid in *Cox* was found not to "..... have as [its] specific purpose the regulation of traffic." (p. 553) Similarly, the ordinance here is not aimed at regulation of traffic around schools as is dramatically evidenced by the exemption in the ordinance allowing labor picketing within 150 feet of a school. Significantly, a

similar exemption for labor picketing was present in the ordinance in *Cox*. The Court's incisive comment on that exemption is strikingly apropos: "This exception [for labor picketing] points up the fact that the statute reaches beyond mere traffic regulation to restriction on expression." (p. 556 n. 14)

There is no doubt that the state has a valid interest in protecting schools from interferences and disruptions. However, the fact that the ordinance refers to schools does not *a fortiori* make it constitutional. In the recent case of *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969), this Court sustained the rights of students to wear black armbands in school as a means of protesting the Viet Nam war. It held that students *within a school* cannot broadly and absolutely be denied their First Amendment rights, and the state must show a "material and substantial" interference or disruption with the functioning of the school before it may intrude upon these rights of expression and free speech.

Petitioners bandy about phrases such as distractions, disruptions, disturbances and racial violence at public high schools, and, grasping at almost anything, they blithely cite *Newsweek* magazine statistics on "racial strife" and "arson attempts" in the nation's high schools (Petitioners' brief, p. 30) as grounds to sustain the ordinance. However, there is simply no issue of violence, threats of violence, disturbances or disruptions in this case, and the subject ordinance is not directed or limited to such problems. If the City of Chicago is concerned about violence or disruptions, it may specifically legislate on those matters. The ordinance evinces no "substantial and material" re-

lationship, as required by *Tinker*, between picketing and any interferences or disruptions of schools. It instead drastically overreaches by going far beyond such activities or any other manner or purpose for which picketing may be conducted and bans all exercises of free speech through picketing.

Petitioners seek to sustain the ordinance as a "reasonable regulation" by contending that a person is free to picket more than 150 feet from a school or at another time. (Petitioners' brief, p. 15) This argument has been made before and flatly rejected by this Court:

> One is not to have the exercise of his liberty of his expression in appropriate places abridged on the plea that it may be exercised some other place. *Schneider* v. *State*, 308 U.S. 147, 163 (1939).

See also, *Food Employees* v. *Logan Plaza*, 391 U.S. 308 (1968).

They further claim the 150-foot limitation is a "buffer zone" which they allege is required to shield schools from violence or disruptions.[6] The fear of the City over possible violence and disruptions and the possible affect of picketing upon others is the same fear that was urged by the school district in *Tinker* v. *Des Moines Independent Community School District*, *supra*, to defend its disregard for the First Amendment. This Court rejected that argument, stating:

> The District Court concluded that the action of the school authorities was reasonable because it was based

[6] Petitioners' analogy to a hospital zone of quiet is specious, as a hospital zone of quiet has only an incidental effect upon free speech (such as prohibiting loud noises), whereas the anti-picketing ordinance here is aimed solely at proscribing all exercises of free speech by means of picketing.

upon their fear of a disturbance from the wearing of the armbands. *But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.* Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello* v. *Chicago,* 337 U. S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society. (pp. 508-9, emphasis added)

See also, *Cohen* v. *California,* 403 U.S. ....., 91 S.Ct. 1780 (1971).

Nor can this claimed "buffer zone" be used to flatly deny citizens access to the public streets for expression of their views. This Court has recognized the importance of the public forum as a marketplace for the exchange of ideas:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. . . . *Hague* v. *CIO,* 307 U.S. 495, 515-16 (1939)
>
> . . . streets, sidewalks, parks and other similar public places are so historically associated with the exercise of the First Amendment rights that access to them for the purpose of exercising such rights *cannot constitutionally be denied broadly and absolutely. Food Employees* v. *Logan Plaza,* 391 U.S. 308, 315 (1968) (emphasis added)

Thus, the constitutional defect of the City of Chicago ordinance is that, on its face, it is not directed to any possible abuse of picketing, that is, an unlawful purpose or improper manner. Nor does the ordinance on its face attempt to reconcile any interest of the state with the historic and sacrosanct right of the citizen to peacefully express his views. Rather, it flatly and arbitrarily prohibits all picketing within 150 feet of a school, thereby flagrantly depriving Respondent of rights secured him by the First Amendment. This encroachment by the state on the right to peacefully picket under the guise of "reasonableness" is what Justice Black in *Gregory* v. *City of Chicago*, 394 U.S. 111, 118 (1969) (concurring opinion) termed a "meat-ax" ordinance—one which sweeps within its prohibition every type of conduct, including those that are protected by the First Amendment, as well as those that could be legitimately regulated.

The City of Chicago has effectively deprived Respondent of one of our most fundamental and sacred liberties—the right to speak and convince others of one's views and to seek change in a peaceful, orderly and democratic manner. It is submitted that Section 193-1(i) of the Chicago disorderly conduct ordinance is patently unconstitutional on its face.

II.

THE ORDINANCE ON ITS FACE VIOLATES THE FOURTEENTH AMENDMENT BY DENYING CITIZENS EQUAL PROTECTION UNDER THE LAW.

The Court of Appeals did not deem it necessary to consider Respondent's argument that the ordinance violates the equal protection clause by denying all citizens *except those engaged in a labor dispute* the right to picket or demonstrate adjacent to a school, because the Court found that the ordinance violates the First Amendment. The in-

vidious classifications in this ordinance in violation of the Fourteenth Amendment are inextricably bound to the denial of First Amendment rights, as Respondent is banned from peacefully picketing within 150 feet of a school while any teacher, janitor or other person "involved in a labor dispute" can picket free from this 150-foot prohibition. Hence, Respondent repeats here his argument as to why this ordinance flagrantly denies him equal protection under the law.[7]

The equal protection clause permits classifications which are reasonable in nature and not arbitrary and invidious. The Court in *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522 (1958) defined the test under the equal protection clause:

> . . . there is a point beyond which the state cannot go without violating the Equal Protection Clause. The state must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. (p. 527)

---

[7] The City argued at trial that the federal government pre-empted the field of labor relations, thereby requiring the exemption in the ordinance. Petitioners concede on page 27 of their brief that the pre-emption argument is spurious because the National Labor Relations Act does not cover states or subdivisions thereof, as they are not considered "employers" under Section 152 of the Act (29 U.S.C.A. §152). This same argument has been rejected in other cases. *City of Alcoa* v. *IBEW Local 760,* 203 Tenn. 12, 308 S.W.2d 476 (1967); *International Longshoremen's Association* v. *Harris County—Houston Ship Channel,* 358 S.W. 2d 648 (1962).

See also *Southern Railway Co.* v. *Greene*, 216 U.S. 400 (1909); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966).

Moreover, it was observed in *Williams* v. *Rhodes*, 393 U.S. 23, 39 (1968):

> When fundamental rights and liberties are at issue, a state has less leeway in making classifications than when it deals with economic matters. (Justice Douglas, concurring opinion, reiterated in *Kramer* v. *Union Free School District*, 395 U.S. 621 1968).

See also *Loving* v. *Virginia*, 388 U.S. 1 (1967).

Applying these fundamental principles to the case at bar, the flaw in Chicago's ordinance is manifest.

Petitioners have taken the position that tranquility at the schools is the goal of the legislation. Respondent does not argue with this most laudable purpose. But, Respondent urges that the unreasonable distinction between labor dispute picketers and all others bears no relationship to that purpose. Petitioners ask this Court to sanction a classification which on the one hand bans the admittedly silent peaceful picketing of Respondent, interfering with and disrupting no one, but on the other hand permits dozens of labor pickets to encircle a school from morning until night. Petitioners obviously realize that this distinction is invidious, for they resort to the position in their brief that labor disputes are peaceful while *all* other picketing and demonstrations are not. (Petitioners' brief, pp. 29-30) To illustrate the absurdity of this position, one only has to compare the admittedly peaceful march of Respondent with the almost daily reports of violence and threatened violence connected with labor disputes.

Thus, not only does the ordinance arbitrarily create classifications of citizens which bear no substantial relation to the stated goals of the ordinance, but the City of Chicago is attempting to discriminate as to what views may peacefully be expressed on the public way. Although there are no other decisions of this Court concerning similar exemptions for labor picketing, Justice Black in his concurring opinion in *Cox* v. *Louisiana, supra*, addressed himself to this issue as the statute in *Cox* (cited on p. 11) contained a like exemption for labor picketing.[8] Justice Black stated:

> . . . by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an *invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment.* (p. 581, emphasis added)

In the consolidated case relied on by Petitioners on Page 30 of their brief, the Supreme Court of Illinois held that an ordinance of the City of Rockford, Illinois, identical to the Chicago ordinance in question, was not violative

[8] As noted previously (p. 11), the majority opinion was based upon violation of the First Amendment by reason of the uneven enforcement and application of the statute.

of the equal protection clause. *Rockford* v. *Grayned*, 46 Ill. 2d 486 (1970) It is submitted that the Supreme Court of Illinois overlooked the controlling principles cited above as it apparently was willing to give carte blanche authority to the legislature to establish classifications as to who may picket a school.

The Court in *Grayned* simply stated that there may be a reasonable basis upon which the City of Rockford could classify labor picketing differently than other picketing. But the Court only went half way. What it failed to do was to determine whether these classifications bore a substantial and reasonable relation to the goals sought to be attained—tranquility of the schools—and further to determine the effect of these classifications upon preferred First Amendment rights. As demonstrated earlier, the exemption for labor picketing bears no reasonable relationship to preserving tranquility of the schools. Furthermore, the ordinance's crippling effect on the exercise of rights secured by the First Amendment for all persons not involved in a labor dispute, makes it clearly repugnant to the First Amendment as well as to the equal protection clause of the Fourteenth Amendment.

Had Respondent or a teacher sought to picket for higher wages or shorter hours for teachers or claiming that the Board of Education discriminates against the hiring of black teachers, the 150-foot ban would not apply. Yet, because Respondent picketed asserting that black students were discriminated against he is prohibited from expressing these ideas by means of a sign on the public sidewalk

adjacent to the school. The Constitution does not tolerate the distinctions occasioned by this ordinance.[9]

Finally, in obvious desperation, Petitioners, recognizing that the ordinance violates the equal protection clause, suggest that the labor exemption should be severable. Petitioners' reliance on *Davis* v. *Wallace*, 257 U.S. 478 (1922) to support this argument is totally misplaced, for the Court in *Davis* held the invalid portion of the statute in that case was not severable. The reasoning of the Court, conveniently overlooked by Petitioners, answers why the labor picketing exemption in the instant case which was *part of the original enactment* cannot be severed and the entire ordinance must fall:

> *Here the excepting provision was in the statute when it was enacted, and there can be no doubt that the legislature intended that the meaning of the other provisions should be taken as restricted accordingly.* Only with that restricted meaning did they receive the legislative sanction which was essential to make them part of the state law of the state; and no other authority is competent to give them a larger application. (pp. 484-5 emphasis added)

---

[9] Petitioners' argument that the exemption for labor picketing is permissible since strikes by public employees are enjoinable under Illinois law is unfounded (Petitioners' brief, p. 29). The labor exemption applies to more than strikes by public employees. It allows janitors, teamsters or anyone else to picket a school concerning an issue involving a labor dispute. In addition, simply because a strike by public employees can be enjoined in a civil action, it does not follow that an exemption for labor picketing in a *criminal* ordinance is meaningless, for the ordinance thus permits public school employees to picket free from the *criminal* sanctions that are imposed on all other classes of people.

The City of Chicago ordinance is a flagrant violation of the equal protection clause of the Fourteenth Amendment and for this reason also, the ordinance must be held unconstitutional.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that §193-1(i) of the Municipal Code of the City of Chicago is unconstitutional and the decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-87

POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, SUPERINTENDENT OF THE POLICE DEPARTMENT OF THE CITY OF CHICAGO, AND RICHARD J. DALEY, MAYOR OF THE CITY OF CHICAGO,

Petitioners,

vs.

EARL D. MOSLEY,

Respondent.

ON WRIT OF CERTIORARI OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONERS.

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IN THE

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OCTOBER TERM, 1971.

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POLICE DEPARTMENT OF THE CITY OF CHICAGO, JAMES B. CONLISK, SUPERINTENDENT OF THE POLICE DEPARTMENT OF THE CITY OF CHICAGO, AND RICHARD J. DALEY, MAYOR OF THE CITY OF CHICAGO,

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vs.

EARL D. MOSLEY,

Respondent.

ON WRIT OF CERTIORARI OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONERS.

ARGUMENT.

I.

REGULATION OF THE TIME AND PLACE OF PEACEFUL PICKETING IS CONSTITUTIONAL.

Evidently Mosley thinks that an ordinance which requires the police to make an appraisal whether picketing is being carried on with an intent to disrupt school classes or obstruct school entrances would be constitutionally preferable to a narrowly drawn enactment, such as the legislation

here under scrutiny, which simply prohibits picketing within a short distance of schools during school hours. Mosley's preference would invite overbroad enforcement. Certainly it is desirable to eliminate or at least limit, insofar as possible, the subjective discretion of police officers.

This Court knows far better than the instant litigants whether or not its precedents corroborate Mosley's view (Respondent's Brief, p. 1) that "[p]eaceful picketing is protected free speech and *only* the manner or purpose of picketing may be regulated when required by an overriding state interest;" (emphasis supplied).

To us it seems clear enough that these precedents unmistakeably hold that the time and place of peaceful picketing may be regulated, if this furthers a substantial governmental interest—provided the governmental interest is unrelated to the suppression of free expression. *United States* v. *O'Brien*, 391 U. S. 367, at 376 (1968), bears this out. We cited *O'Brien* in our Petitioners' Brief (pp. 24, 25), but Respondent's Brief failed to respond.

Mosley also has nothing to say in reply to our citation (Petitioners' Brief, pp. 22, 33) of this Court's clear statement on this topic in *Edwards* v. *South Carolina*, 372 U. S. 229 (1963). In holding unconstitutional breach of the peace convictions of a group demonstrating on State House grounds, this Court there said (at 236):

> "If . . . the petitioners . . . had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case."

In *Cox* v. *Louisiana*, 379 U. S. 536 (1965), this Court, after citing 12 precedents, stated (at 554, 555):

> "From these decisions certain clear principles emerge. The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that

everyone with opinions or beliefs to express may address a group at any public place and at any time. . . .

"We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."

And in the other *Cox* v. *Louisiana*, 379 U. S. 559 (1965), this Court said (at 574):

"There is a proper time and place for even the most peaceful protest. . . ."

Mosley's claim (Respondent's Brief, p. 7) that "peaceful picketing is beyond governmental regulation" is irreconcilable with these and other well-known decisions of this Court.

Grayned's directing the Court (Appellant's Brief, p. 15) to Kalven's article, *The Concept of the Public Forum: Cox* v. *Louisiana*, Supreme Ct. Rev. (1965) 1., for a detailed account of the opinions of this Court on this topic, is somewhat surprising. Kalven regards all speech as necessarily "speech plus" (at 23 et seq.). He advocates the drafting of a set of "Robert's Rules of Order for use of the public forum of the streets" (at 26), regulations precisely drawn in terms of "the neutrality of time, place and circumstance" without concern for content (at 29), with the aim of "some commitment to order and etiquette" in the use of the public forum (at 23). Kalven cites (23-25) "the champion of the position that the First Amendment is an absolute," Meiklejohn, *Political Freedom* (1960), 24-28, in support of a "call for regulation of such activity on behalf of the rational use of speech resources" and quotes (at 25) Meiklejohn, who said, in part:

> "Anyone who would thus irresponsibly interrupt the activities of a lecture, a hospital, a concert hall, a church, a machine shop, *a classroom,* a football field, or a home, does not thereby exhibit his freedom. Rather, he shows himself to be a boor, a public nuisance, who must be abated, by force if necessary." (Emphasis supplied.)

Kalven himself half suggests (at 17) that a city might be able to "solve its problems by setting aside special areas for protests and demonstrations and closing its streets and parks to them otherwise," that is, "the setting up of 'Hyde Parks'."

Thus, according to Grayned's prime repository of constitutional wisdom on this topic, regulation of the time and place of peaceful demonstrations and picketing is not unconstitutional. In comparison with Kalven's proposals, Chicago's buffer zone of 150 feet around public schools during school hours is an extremely modest regulation.

II.

THE COURT CAN TAKE JUDICIAL NOTICE OF THE BACKGROUND OF WIDESPREAD DISORDERS AT SCHOOLS THAT OCCASIONED THE ENACTMENT OF THIS ORDINANCE.

"Courts are presumed to be no more ignorant than the public generally, and will take judicial notice of that which everyone knows to be true." *Chicago* v. *Murphy,* 313 Ill. 98, 102 (1924).

Facts enter importantly into the legislative process. The reasonableness of legislation is commonly tested by the courts against a factual background of their own developed by the broadest kind of judicial notice. Cleary, *Handbook of Illinois Evidence* (1963), p. 44.

Mosley's brushing aside (Respondent's Brief, p. 12) our allusion (Petitioners' Brief, pp. 5, 8, 10) to the notorious

school disorders of recent years as "bandy[ing] about phrases" is irresponsible. The purpose of a legislative enactment is to be gathered from the whole act. It is not necessary that the legislature make express findings of fact. "A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act." *Miller v. Milwaukee*, 272 U. S. 713, at 715 (1927) (Holmes, *J.*).

Nor is it true that, as Mosley avers (Respondent's Brief, p. 3), our contention that the ordinance "was enacted as a result of widespread violence and disorders around schools [is] totally unsupported by the record." The opinion of the Court of Appeals itself notes that "[d]efendants justify this ordinance as a reasonable attempt to forestall violence in an era* of protest and demonstration by the creation of a 150 foot 'buffer zone' during school hours."

It is singularly inappropriate for Respondent to attempt, in this Court, to force a view of the constitutionality of this ordinance, on its face, prismatically, solely through the refracted image of Mosley's picket sign, and not in the bright light of a national crisis, with which the ordinance attempts to cope, locally. This Court cannot "be regarded merely as another law court" (Jackson, *The Supreme Court in the American System of Government* (1963 ed.), p. 2). It is also a function of this Court to keep the Constitution attuned to the needs of "a society in which rapid changes tend to upset all equilibrium" (*id.*, p. 61). It does not assist the Court in the performance of this function, to insist, as Mosley does, that the Court blind itself to what everyone knows.

Counsel for Respondent themselves necessarily know,

*A. 45 incorrectly renders this as "area of protest and demonstration." That is a typesetter's error. See 432 F. 2d 1256, at 1258. The appendix to our petition for certiorari (p. A4) reproduced the word correctly as "era".

from their participation as attorneys for the defendants in three prosecutions under this ordinance, now pending and under advisement in the Illinois Appellate Court, First District (*City of Chicago* v. *Polito et al.*, Nos. 54334-5-6), that the immediate occasion for the enactment of this ordinance was the need to protect black school children, who had been bussed to predominantly white schools, from hostile mobs. That is of record in the *Polito* cases. (*Polito*, Exc. 75-81.)

This ordinance is a more essential instrument in combatting racial discrimination than Mosley's picket sign.

III.

UNDER BOTH THE "OLD" AND THE "NEW" EQUAL PROTECTION, THE EXEMPTION OF LABOR PICKETING IS NOT INVIDIOUS DISCRIMINATION.

The exemption of labor picketing from the scope of the ordinance is without doubt valid under what is now frequently called the "old" Equal Protection, enunciated in such cases as *Railway Express Agency* v. *New York*, 336 U. S. 106 (1949), *Goesaert* v. *Cleary*, 335 U. S. 464 (1948), *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955), and *McGowan* v. *Maryland*, 366 U. S. 420 (1961). The essence of this doctrine was succinctly stated by Chief Justice Warren in *McGowan* (at 425, 426) thus:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some in-

equality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See *Kotch* v. *Board of River Port Pilots Comrs.*, 330 U. S. 552, 91 L. ed. 1093, 67 S. Ct. 910; *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580, 79 L. ed. 1070, 55 S. Ct. 538; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912 C 160; *Atchison, T. & S. F. R. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 S. Ct. 609."

Another articulation of the traditional criteria, also by Chief Justice Warren, is to be found in the fairly recent *McDonald* v. *Board of Election Commissioners of Chicago*, 394 U. S. 802, at 808 (1969):

"Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. [Citations.]"

The exemption of labor picketing from the ordinance is amply justified under this test. A state of facts certainly may be reasonably conceived to justify the exemption. The City Council without doubt has some reason to conclude that labor picketing is now usually more orderly than "public issue" picketing. Employees have a very palpable economic stake in their employer's business and their jobs there. Labor picketing is usually directed by experienced

professionals and under the much more detailed guidelines laid down by the National Labor Relations Board, which is empowered to issue unfair practice charges against unions as well as employers. Labor picketing is now usually token picketing. See Kamin, *Residential Picketing and the First Amendment*, 61 Nw. U. L. Rev. 177, at 208, 209 (1966). The distinction between labor picketing and "public issue" picketing is reasonably related to the requirements of assuring orderly conditions for the conduct of public education, certainly a legitimate state end.

Justice Frankfurter, in his well-known summary in *Niemotko* v. *Maryland*, 340 U. S. 268, at 273-283 (1951), of the principal decisions of this Court, to that date, concerning "[a]djustment of the inevitable conflict between free speech and other interests", touched upon the difference between labor picketing and general use of the streets for communication, whether of religious exhortation, political propaganda or protest. He said (at 276):

> "The picketing cases are logically relevant since they usually involve, in part, dissemination of information in public places. But here also enter economic and social interests outside the situations before us."

The distinction between labor picketing and "public issue" picketing was clearly drawn in *Davis* v. *Francois*, 5 Cir., 1968, 395 F. 2d 730, at 735. Speaking of an ordinance of Port Allen, Louisiana, which absolutely limited all picketing to a maximum of two pickets, that court said:

> "By failing to distinguish 'public issue' pickets from private pickets the ordinance creates numerous problems. Private pickets are usually concerned with labor disputes. It would appear that the statute might reach even these, since private residences and places of business are within its ambit. The decisions suggest that private pickets are exercises of economic power and create many issues not caused by the 'public issue' demonstration." See *International Brotherhood, etc.*,

v. *Vogt, Inc.*, 1957, 354 U. S. 284, 77 S. Ct. 1166, 1 L. Ed. 2d 1347; *Hughes* v. *Superior Court*, 1949, 339 U. S. 460, 70 S. Ct. 718, 94 L. Ed. 985."

Under the "new" Equal Protection as is well known, the Court has in recent years applied more stringent criteria in cases involving "fundamental" rights. See *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969). It is stated in *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, at 670 (1966), thus:

> "[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."

What this implies is succinctly put in *Shapiro* v. *Thompson*, 394 U. S. 618, at 638 (1969):

> "Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." (Emphasis in original.)

Karst has articulated the "new" Equal Protection into a three-part formula: (1) Does the classification "discriminate" against "a disadvantaged group"; (2) Does that discrimination relate to an interest that is "basic" or "fundamental" or "critical"; if so, (3) Is the state's justification "compelling" enough to overcome the presumptive invalidity implied in a phrase like "strict scrutiny"? Karst, *Invidious Discrimination: Justice Douglas and the Return of the Natural-Law-Due-Process Formula*, 16 U. C. L. A. L. Rev. 716, at 739 (1969).

Should the "new" Equal Protection be applied to the ordinance at bar? Does the exemption of labor picketing "discriminate" against a "disadvantaged group"? The group that is subject to the limitation is simply the general public; that cannot be considered a disadvantaged group.

Is the interest in engaging in the speech-plus activity of demonstrating and picketing within 150 feet of a school during school hours and within one-half hour before and after school hours "basic", "fundamental" or "critical"? In the heat of advocacy, counsel for Mosley may be expected to argue that it is. But common sense requires a different answer.

In *McDonald* v. *Board of Election Commissioners of Chicago*, 394 U. S. 802 (1969), this Court, in holding that an absentee balloting statute did not violate the equal protection clause in failing to provide coverage for pretrial jail inmates, ruled that the "new" Equal Protection did not apply, even though voting rights were involved. Although as determined in *Reynolds* v. *Sims*, 377 U. S. 533 (1964) and *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966), the franchise is a basic, fundamental right, the Court ruled (at 807) that the more exacting approach was not applicable, because (1) "Illinois' absentee provisions are not drawn on the basis of wealth or race" and (2) because the right to vote was not at stake, but merely a claimed derivative right to receive absentee ballots. In consequence, the Court applied the "old", less stringent criteria, which are stated thus by Chief Justice Warren (at 809):

> "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. [Citations.]"

The classification in the instant ordinance is not based on wealth or race. The right of free speech is not at stake, for "public issue" picketers can still picket at any distance in excess of 150 feet from a school, even during school hours, and they can also picket even on the steps of the school itself outside school hours—even though hundreds

of students are then still to be found in the recreational area. The reasoning of the Court in *McDonald* establishes the validity of the labor exemption in the Chicago Ordinance.

The exemption of labor picketing is also justified by a "compelling" state interest—the interest in promoting freedom of speech. Experience over the years had convinced the City Council of Chicago that it had no reason to fear disruption of the schools by labor picketing. Therefore, although the many disruptions arising from "public issue" demonstrations at schools in recent years made advisable, in the legislative judgment, the creation of a small buffer zone around schools during school hours, there was no reason to apply this so as to limit labor picketing. Chicago has kept the restrictions on demonstrating to the bare necessary minimum.

Mosely's citation (Respondent's Brief, p. 18) of Justice Black's concurring opinion in *Cox* v. *Louisiana*, 379 U. S. 559, at 581 (1965), is inapposite. The Louisiana statute Justice Black was discussing, while generally prohibiting obstruction of public sidewalks, streets, highways, bridges, passages, corridors, etc., expressly exempted any "bona fide legitimate labor organization." In other words, the Louisiana statute permitted labor organizations, but no one else, to obstruct public passages in picketing and other concerted activities. It is difficult to construe that as other than invidious discrimination. The Louisiana statute allowed labor organizations, that is, those "bona fide" unions of which the authorities approved, to picket and demonstrate on every public street and sidewalk, but prohibited picketing and demonstration on any public street or sidewalk by all others (including, of course, civil rights organizations).

The Chicago ordinance does no such thing. It is limited to the narrow area of 150 feet from public schools during

school hours. It makes no distinction between labor picketing and other picketing except in those strictly delimited places and even there, only at such times as schools are in session or students are coming and going. The Louisiana statute was sweepingly broad; the Chicago ordinance is precisely narrow.

Mosley uses a strong word negligently when he states (Respondent's Brief, p. 16) that the "Petitioners concede . . . that the pre-emption argument is spurious." Petitioners actually said (Petitioner's Brief, p. 27) that "[t]he argument based on federal pre-emption has some merit." They further stated that, despite the exemption in Section 152 of the National Labor Relations Act (29 U. S. C. A. § 152) of states and their political subdivisions from the definition of "employer," nevertheless, since observance by employees of private employers of picket lines of public employees can have repercussions in the federal sphere, the City was well advised to avoid this quagmire of labor law and labor relations by exempting labor picketing from the ordinance.

CONCLUSION.

The judgment of the Court of Appeals should be reversed in its entirety.

Respectfully submitted,

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January 14, 1972.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

POLICE DEPARTMENT OF THE CITY OF CHICAGO ET AL. *v.* MOSLEY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 70-87. Argued January 19, 1972—Decided June 26, 1972

City ordinance prohibiting all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute, found by the Court of Appeals to be unconstitutional because overbroad, *held* violative of the Equal Protection Clause of the Fourteenth Amendment since it makes an impermissible distinction between peaceful labor picketing and other peaceful picketing. Pp. 3–11.

432 F. 2d 1256, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, WHITE, and POWELL, JJ., joined. BURGER, C. J., filed a concurring opinion. BLACKMUN and REHNQUIST, JJ., concurred in the result.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 70–87

Police Department of the City of Chicago et al., Petitioners, *v.* Earl D. Mosley.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 26, 1972]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is the constitutionality of the following Chicago ordinance:

> "A person commits disorderly conduct when he knowingly:
>
> . . . . . .
>
> "(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school has been concluded, provided, however, that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute." Mun. Code, c. 193–1 (i).

The suit was brought by Earl Mosley, a federal postal employee, who for seven months prior to the enactment of the ordinance had frequently picketed Jones Commercial High School in Chicago. During school hours and usually by himself, Mosley would walk the public sidewalk adjoining the school, carrying a sign that read: "Jones High School practices black discrim-

ination. Jones High School has a black quota." His lonely crusade was always peaceful, orderly and quiet, and was conceded to be so by the city of Chicago.

On March 26, 1968, Chapter 193–1 (i) was passed, to become effective on April 5. Seeing a newspaper announcement of the new ordinance, Mosley contacted the Chicago Police Department to find out how the ordinance would affect him; he was told that, if his picketing continued, he would be arrested. On April 4, the day before the ordinance became effective, Mosley ended his picketing next to the school.[1] Thereafter, he brought this action in the United States District Court for the Northern District of Illinois, seeking declaratory and injunctive relief, pursuant to 28 U. S. C. § 2201 and 42 U. S. C. § 1983. He alleged a violation of constitutional rights in that (1) the statute punished activity protected by the First Amendment; and that (2) by exempting only peaceful labor picketing from its general prohibition against picketing, the statute denied him "equal protection of the law in violation of the First and Fourteenth Amendments . . . ."

After a hearing, the District Court granted a directed verdict dismissing the complaint. The Seventh Circuit reversed, holding that because the ordinance prohibited even peaceful picketing next to a school, it was overbroad and therefore "patently unconstitutional on

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[1] Occasionally, thereafter, Mosley would picket across the street, outside the 150 feet zone. At the hearing below, Mosley testified that "when I was across the street from the school, 150 feet away, you cannot hardly see me. The question that all of the people asked me was, 'Where is the school located?' They don't even see the school across the street, you know. So, what it does, it takes away a certain amount of the effectiveness . . . . [W]hen I am across the street, I am sort of out of the picture . . . ." Appendix, p. 24–25.

its face." 432 F. 2d 1256, 1259 (1970). We granted certiorari, 404 U. S. 821 (1971), to consider this case along with *Grayned* v. *City of Rockford, post,* in which an almost identical ordinance was upheld by the Illinois Supreme Court, 46 Ill. 2d 486 (1970). We affirm the judgment of the Seventh Circuit, although we decide this case on the ground not reached by that court. We hold that the ordinance is unconstitutional because it makes an impermissible distinction between labor picketing and other peaceful picketing.

I

The city of Chicago exempts peaceful labor picketing from its general prohibition on picketing next to a school.[2] The question we consider here is whether this selective exclusion from a public place is permitted. Our answer is no.

Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment. Of course, the equal protection claim in this case is closely intertwined with First Amendment interests;[3] the Chicago ordinance affects picketing, which is expressive

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[2] By its terms, the statute exempts "the peaceful picketing of any school involved in a labor dispute." It is undisputed that this exemption applies only to *labor* picketing of a school involved in a labor dispute.

[3] For discussions of the First Amendment-Equal Protection intersection, see Kalven, The Concept of the Public Forum, 1965 Sup. Ct. Rev. 1, 29–30; Emerson, The System of Freedom of Expression 303–304, 305–307 (1970). Blasi, Prior Restraints on Demonstrations, 68 Mich. L. Rev. 1482, 1492–1497 (1970); Van Alstyne, Political Speakers at Universities: Some Constitutional Considerations, 111 U. Pa. L. Rev. 328, 337–339 (1963); see also *Niemotko* v. *Maryland,* 340 U. S. 268, 272 (1951).

conduct; moreover, it does so by classifications formulated in terms of the subject of the picketing. As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment. See *Reed* v. *Reed*, 404 U. S. 71, 75–77 (1971); *Weber* v. *Aetna Casualty*, — U. S. — (1972); *Dunn* v. *Blumstein*, — U. S. —, — (1972).

The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Cohen* v. *California*, 403 U. S. 15, 24 (1971); *Street* v. *New York*, 394 U. S. 576 (1969); *New York Times* v. *Sullivan*, 376 U. S. 254, 269–270 (1964), and cases cited; *NAACP* v. *Button*, 371 U. S. 415, 445 (1963); *Wood* v. *Georgia*, 370 U. S. 375, 388–389 (1962); *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949); *DeJonge* v. *Oregon*, 299 U. S. 353, 365 (1937). To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times* v. *Sullivan*, *supra*, at 270.

Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views

it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas,"[4] and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Guided by these principles, we have frequently condemned such discrimination among different users of the same medium for expression. In *Niemotko* v. *Maryland*, 340 U. S. 268 (1951), a group of Jehovah's Witnesses were denied a permit to use a city park for Bible talks, although other political and religious groups had been allowed to put the park to analogous uses. Concluding that the permit was denied because of the city's "dislike for or disagreement with the Witnesses or their views," this Court held that the permit refusal violated "[t]he right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendment." *Id.*, at 272. The Court followed *Niemotko* in *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953), where again the Jehovah's Witnesses were refused permission to conduct religious services in a park, although other religious groups had been permitted to do so. Similarly, because of their potential use as instruments for selectively suppressing some points of view, this Court has condemned licensing schemes which lodge broad discretion in a public official to permit speech-related activ-

[4] A. Meiklejohn, Political Freedom: The Constitutional Powers of The People 27 (1948).

ity, see, *e. g.*, *Shuttlesworth* v. *Birmingham*, 394 U. S. 147 (1969); *Cox* v. *Louisiana*, 379 U. S. 536, 555–558 (1965); *Staub* v. *City of Baxley*, 355 U. S. 313, 321–325 (1958), and cases cited; *Saia* v. *New York*, 334 U. S. 558, 560–562 (1948).[5]

The late Mr. Justice Black, who thought that picketing was not only a method of expressing an idea but also conduct subject to broad state regulation, nevertheless recognized the deficiencies of laws like Chicago's ordinance. This was the thrust of his concurring opinion in *Cox* v. *Louisiana*, 379 U. S. 536, 581 (1965):

> "[B]y specifically permitting picketing for the publication of labor union views [but prohibiting other sorts of picketing], Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble in its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment."

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[5] See also *Tinker* v. *Des Moines School District*, 393 U. S. 503, 510–511 (1969); *Adderley* v. *Florida*, 385 U. S. 39, 47 (1966); *Carlson* v. *California*, 310 U. S. 106, 112 (1940); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr. 430, 434 P. 2d 982 (1967); *Bynum* v. *Schiro*, 219 F. Supp. 204 (1963), aff'd, 375 U. S. 395 (1964); *East Meadow Assn.* v. *Board of Education*, 18 N. Y. 2d 129 (1966); *Matter of Madole* v. *Barnes*, 20 N. Y. 2d 169 (1967); *Crowthers* v. *United States*, — F. 2d — (CA4 1972); and the litigation in *Ellis* v. *Dixon*, 349 U. S. 458 (1955). Cf. *Flower* v. *United States*, — U. S. — (1972).

We accept Justice Black's quoted views. Cf. *NLRB* v. *Fruit and Vegetable Packers*, 377 U. S. 58, 76 (1964) (Black, J., concurring).

II

This is not to say that all picketing must always be allowed. We have continually recognized that reasonable "time, place and manner" regulations of picketing may be necessary to further significant governmental interests. *Cox* v. *New Hampshire*, 312 U. S. 569, 575–576 (1941); *Poulos* v. *New Hampshire*, 345 U. S. 395, 398 (1953); *Cox* v. *Louisiana*, 379 U. S. 536, 554–555 (1965); *Cox* v. *Louisiana*, 379 U. S. 559 (1965); *Adderley* v. *Florida*, 385 U. S. 39, 46–48 (1966). Similarly, under an equal protection analysis, there may be sufficient regulatory interests justifying selective exclusions or distinctions among picketers. Conflicting demands on the same place may compel the State to make choices among potential users and uses. And the State may have a legitimate interest in prohibiting some picketing to protect public order. But these justifications for selective exclusions from a public forum must be carefully scrutinized. Because picketing plainly involves expressive conduct within the protection of the First Amendment, see, *e. g.*, *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Chauffeurs, Teamsters & Helpers Local Union 795* v. *Newell*, 356 U. S. 341 (1958); *Garner* v. *Louisiana*, 368 U. S. 157, 185 (1961) (Harlan, J., concurring); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Cox* v. *Louisiana*, 379 U. S. 536, 546 (1965); *Food Employees* v. *Logan Valley*, 391 U. S. 308, 314–315 (1968); *id.*, at 337 (WHITE, J., dissenting); *Gregory* v. *City of Chicago*, 394 U. S. 111, 112 (1969); *Shuttlesworth* v. *City of Birmingham*, 394 U. S. 147, 155 (1969), discriminations among picketers must be tailored to serve a substantial governmental interest. Cf. *Williams* v. *Rhodes*, 393 U. S. 23 1968.

III

In this case, the ordinance itself describes impermissible picketing not in terms of time, place and manner, but in terms of subject matter. The regulation "thus slip[s] from the neutrality of time, place and circumstance into a concern about content."[6] This is never permitted. In spite of this, Chicago urges that the ordinance is not improper content censorship, but rather a device for preventing disruption to the school. Cities certainly have a substantial interest in stopping picketing which disrupts a school. "The crucial question, however, is whether [Chicago's ordinance] advances that objective in a manner consistent with the commands of the Equal Protection Clause." *Reed* v. *Reed*, 404 U. S. 71, 76 (1971). It does not.

Although preventing school disruption is a city's legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school. Therefore, under the Equal Protection Clause, Chicago may not maintain that other picketing disrupts the school unless that picketing is clearly more disruptive than the picketing Chicago already permits. Cf. *Tinker* v. *Des Moines School District*, 393 U. S. 503, 511 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr. 430 (1967). If peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful. "Peaceful"

[6] Kalven, The Concept of the Public Forum, The Supreme Court Review 1965, p. 29. Cf. *Cox* v. *Louisiana*, 379 U. S. 536, 556 n. 14, where the Court noted that the exemption for labor picketing in a statute otherwise barring on its face all street assemblies and parades, "points up the fact that the statute reaches beyond mere traffic regulation to restrictions on expression."

labor picketing, however the term "peaceful" is defined, is obviously no more disruptive than "peaceful" nonlabor picketing. But Chicago's ordinance permits the former and prohibits the latter. Such unequal treatment is exactly what was condemned in *Niemotko* v. *Maryland, supra,* 340 U. S., at 272–273 (1951).

Similarly, we reject the city's argument that, although it permits peaceful labor picketing, it may prohibit all nonlabor picketing because, as a class, nonlabor picketing is more prone to produce violence than labor picketing.[7] Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines School District,* 393 U. S. 503, 508 (1969). Some labor picketing is peaceful, some disorderly; the

[7] The city notes in its brief, pp. 28–30:

"Although the civil rights movement has understandably endeavored to press into its service the constitutional precedents developed in labor relations litigation,' there are important differences between labor picketing and picketing by civil rights groups. . . . Labor picketing is now usually token picketing. . . . It seldom leads to disruption of the public peace, hardly ever to window smashing, arson. Labor picketing can be carried on without interrupting classes or even distracting the students. . . . As we all know, student demonstrations at schools—and even such demonstrations by parents and 'concerned citizens'—are utterly different. Mass picketing, sit-ins, smashed windows have been the order of the day. The very purpose of such demonstrations often is to bring the educational process to a halt."

same is true for picketing on other themes. No labor picketing could be more peaceful or less prone to violence than Mosley's solitary vigil. In seeking to restrict nonlabor picketing which is clearly more disruptive than peaceful labor picketing, Chicago may not prohibit all nonlabor picketing at the school forum.

The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives. *Williams* v. *Rhodes*, 393 U. S. 23 (1968); see generally *Dunn* v. *Blumstein*, — U. S. —, — (1972).[8] Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject. Given what Chicago tolerates from labor picketing, the excesses of some nonlabor picketing may not be controlled by a broad ordinance prohibiting both peaceful and violent picketing. Such excesses "can be controlled by narrowly drawn statutes," *Saia* v. *New York*, 334 U. S. 558, 562 (1948), focusing on the abuses and dealing evenhandedly with picketing regardless of subject matter. Chicago's ordinance imposes a selective restriction on expressive conduct far "greater than is essential to the furtherance of [a substantial governmental] interest." *O'Brien* v. *United States*, 391 U. S. 367, 377 (1968). Far from being tailored to a substantial governmental interest, the discrimination among picketers is based on the content

[8] In a variety of contexts we have said that "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960). This standard, of course, has been carefully applied when First Amendment interests are involved. *E. g.*, *Schneider* v. *State*, 308 U. S. 147, 164 (1939); *De Jonge* v. *Oregon*, 299 U. S. 353, 364–365 (1937); *Cantwell* v. *Connecticut*, 310 U. S. 296, 307 (1940); *NAACP* v. *Button*, 371 U. S. 415, 438 (1963); *Cox* v. *Louisiana*, 379 U. S. 559, 562–564 (1965); *O'Brien* v. *United States*, 391 U. S. 367 (1968).

of their expression. Therefore, under the Equal Protection Clause, it may not stand.[9]

The judgment is

Affirmed.

MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST concur in the result.

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[9] Chicago argued below that the labor exemption in the ordinance was necessitated by federal pre-emption of the regulation of labor relations. The city now recognizes that the National Labor Relations Act specifically exempts States and subdivisions (and therefore cities and their public school boards) from the definition of "employer" within the Act. 29 U. S. C. § 152. Nevertheless, Chicago urges that the pre-emption argument still has "some merit." It argues that "since observance by employees of private employers of picket lines of public employees can have repercussions in the federal sphere, the city was well advised to avoid this quagmire of labor law and labor relations by exempting labor picketing from the ordinance." Reply Brief, p. 12. This attenuated interest, at best a claim of small administrative convenience and perhaps merely a confession of legislative laziness, cannot justify the blanket permission given to labor picketing and the blanket prohibition for others.

SUPREME COURT OF THE UNITED STATES

No. 70–87

Police Department of the City of Chicago et al., Petitioners, *v.* Earl D. Mosley.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 26, 1972]

MR. CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion but with the reservation that some of the language used in the discussion of the First Amendment could, if read out of context, be misleading. Numerous holdings of this Court attest to the fact that the First Amendment does not literally mean that we "are guaranteed the right to express any thought, free from government censorship." This statement is subject to some qualifications, as for example those of *Roth* v. *United States*, 354 U. S. 476 (1957); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). See also *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).